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Chapter VII.—Probable Cause.
Chapter VIII.—Advice of Counsel.
Chapter IX.—End of the Prosecution.
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ST. LOUIS, MO., JULY 15, 1892.

The fifteenth annual meeting of the American Bar Association will be held at Saratoga Springs, New York, on Wednesday, Thursday and Friday, August 24th, 25th and 26th, 1892. An address will be delivered by John F. Dillon, president of the association. Papers will be read by John W. Cary, of Chicago, on "Limitation of Legislative Power in Respect to Personal Rights and Private Property," and by William L. Snyder, of New York, on "The Problem of Uniform Legislation in the United States." The annual address will be delivered by John Randolph Tucker, of Virginia. The meeting promises to be one of special interest, not only on account of the addresses to be delivered, but also because of the expected debate upon two or three questions which came up at the last meeting, action upon which was postponed until this. Chief among these is the question, which gave rise to considerable acrimonious discussion at the last meeting, of abolishing the jury system.

If the dissenting opinions of courts are worth anything, they are only of value where the dissenting judge indicates the grounds of his dissent, and it is very unsatisfactory, to the profession at least, to be informed that a certain judge dissents, without any revelation as to his opinion. This is especially true where the decision of the court is rendered upon two or more points in the case. It often leaves the student in doubt as to what is really the disputed question. As illustrating the above remarks, we call attention to the case of Dixon v. Chicago & Alton R. Co., recently decided by the Supreme Court of Missouri, wherein we are informed by the official report of the case that two of the judges, viz., Gantt and Sherwood, dissent. In that case there were two questions, the first and most important being whether a laborer working in defendant's quarry under direction of a foreman having no connection with the train service, is a fellow-servant of the employees operating a passenger train on defendant's lines. The other question was as to whether the question of ordinary care exercised by plaintiff, under the circumstances of the case, should go to the jury. The court held in the affirmative on both questions. The court below had held that the quarryman and the train hand were fellow-servants, thereby precluding recovery. In reversing the case, the court enter into an extended argument of the question to what extent employees in different lines or departments of business followed or established by such a master are co-servants, reaching the conclusion that "where a common employer carries on two enterprises, as variant in character as those here considered, each under separate superintendence, the employees at work in each cannot justly be regarded as fellow-servants of the employees in the other, within the meaning of the rule of exemption."

This conclusion seems entirely reasonable and warranted. In the case at hand the master had seen fit to place the deceased quarryman and the train men under supervision and management totally apart from each other. They were not "acting under the same immediate direction"—a rule laid down by the United States Supreme Court in Railway Co. v. Mackey. Each looked to a different individual as the master's representative for directions in his work, and had no practical connection with the superior who guided and supervised the acts and conduct of the other. So far as we know, however, the dissenting judges did not agree to this seemingly correct declaration of law. If they dissented upon the question of contributory negligence of the plaintiff, it would have been well for them to have indicated it, and not left us in doubt as to the grounds and merits of their dissent.

NOTES OF RECENT DECISIONS.

EXECUTION—PROPERTY SUBJECT TO—BLACKBERRIES.—In Sparrow v. Pond, the Supreme Court of Minnesota hold that blackberries while growing on the bushes are not subject to levy on execution as personal property. Mitchell, J., says:

At common law those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man, termed "emblements," and sometimes "*fructus industriales*," were, even while still

annexed to the soil, treated as chattels, with the usual incidents thereof as to seizure on attachment during the owner's life, and transmission after his death. This class included grain, garden vegetables, and the like. On the other hand, the fruit of trees, perennial bushes and grasses growing from perennial roots, and called, by way of contradistinction, "*fructus naturales*," were, while unsevered from the soil, considered as pertaining to the realty, and as such passed to the heir at the death of the owner, and were not subject to attachment during his life. 4 Kent, Comm.; 4 Bac. Abr. 372, tit. "Emblements;" Freem. Ex'ns § 113; 1 Schouler, Pers. Prop. § 100 *et seq.*; State v. Gemmill, 1 Houst. (Del.) 9; Craddock v. Riddlesbarger, 2 Dana, 205; 9 Amer. & Eng. Enc. Law, tit. "Crops;" Rodwell v. Phillps, 9 Mees. & W. 501. A possible exception to this classification is the case of hops on the vines, which have been held to be personal chattels, and subject to sale as such. The ground upon which this seems to be held is that, although the roots of hops are perennial, the vines die yearly, and the crop from the new vines is wholly or mainly dependent upon annual cultivation. The decisions upon that question, however, seem to be all based upon the old case of Latham v. Atwood, Cro. Car. 515. See Frank v. Harrington, 36 Barb. 415. It is sometimes stated that the test whether an unsevered product of the soil is an emblement, and, as such, personal property, is whether it is produced chiefly by the manurance and industry of the owner. But, while this test is correct as far as it goes, it is incomplete. Under modern improved methods all fruits are cultivated, the quality and quantity of the yield depending more or less upon the annual expenditure of labor upon the trees, bushes, or vines; but it has never been held that fruit growing upon cultivated trees was subject to levy as personal property. No doubt all emblements are produced by the manurance and labor of the owner, and are called "*fructus industriales*" for that reason; but the manner, as well as purpose, of planting is an essential element to be taken into consideration. If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product would naturally fall under the head of "emblements." On the other hand, if the tree, bush, or vine is one which requires to be planted but once, and will then bear successive crops for years, the planting would be naturally calculated to permanently enhance the value of the land itself, and the product of any one year could not be said to essentially owe its existence to labor expended during that year; and hence it would be classed among "*fructus naturales*," and the right of emblements would not attach. Darlington, Pers. Prop. 26. This classification is, of course, more or less arbitrary, but it is the one uniformly adopted by the courts (unless hops be an exception), and it is the only one which will furnish a definite and exact rule. Blackberry bushes are perennial, and when planted once yield successive crops. They grow wild but, like every other kind of fruit or berry, are improved by cultivation. The quantity and quality of the yield is largely dependent upon the amount of annual care expended upon them, but the difference in that respect between them and other fruits is only one of degree. It seems to us quite clear that at common law such berries, while growing upon the bushes, were not subject to levy on execution as personal property, and we have no statute changing the rule. Evidently the main purpose of section 315, ch. 66, Gen. St., was, while permitting immature growing crops to be levied on, to prohibit their sale until they were ripe and fit to be harvested. The word "crops" had, long before this statute, acquired in law a meaning synonymous with or equivalent to the common-law term "emblements," and neither of them included fruits of perennial trees or shrubs, and it is to be presumed that the term "crops" is used in the statute in this same sense. The only change effected by the statute as to the kinds of products of the earth which may be levied on while still attached to the soil is, perhaps, to include perennial grasses. As we are of opinion that these berries, while growing on the bushes, were not subject to levy as personal property, it becomes unnecessary to consider any other question in the case. To prevent misapprehension hereafter, it may be well, however, to say, with reference to the question whether crops growing upon a homestead under the statutes of the State are subject levy, or whether their seizure would be an interference with the beneficial use and control of the homestead by the debtor, that it is not determined, as counsel for appellant assume, by the case of Erickson v. Patterson (Minn.), 50 N. W. Rep. 699. In that case the grain grew upon land entered under the United States homestead law, by the provisions of which the land was not liable for debts contracted prior to the issuing of the patent, the exemption not being at all dependent upon occupancy and use as a home. Hence that case would not necessarily control the question discussed in the present case. Judgment affirmed.

OFFICE AND OFFICERS—FAILURE TO TAKE OATH—FORFEITURE.—A question of interest on the subject of the election and qualification of officers arose in State v. Ruff, 29 Pac Rep. 999, decided by the Supreme Court of Washington. It was there held that under Code, § 3063, providing that every office shall become vacant on failure of the incumbent to take his oath of office within the time prescribed by law, such failure does not *ipso facto* work a forfeiture of the right to the office, but simply authorizes the proper authority to declare the forfeiture and fill the office by appointment. Dunbar, J., dissents. Hoyt, J., says:

And from the language used it will be seen that it was the duty of the respondent to have fully qualified within fifteen days after notice of his election; and, if such language is considered mandatory, it would conclusively establish the position contended for by the relator. Is it mandatory or declaratory? Such provisions have almost universally been held to be simply declaratory. See City of Chicago v. Gage, 95 Ill. 593; People v. Holley, 12 Wend. 481; State v. Churchill, 41 Mo. 41; State v. Porter, 7 Ind. 204; State v. Falconer, 44 Ala. 696; Mechem, Pub. Off. §§ 265, 266. The language of this section, then, if standing alone, must, under the authorities, be construed as being simply declaratory. In fact, as we understand the position of relator, he does not question this position, and, if the section above quoted stood alone in our statutes, there would be little ground for controversy in relation to the question at bar; but it is claimed that under the language of this section, as read in the light of section 3063 of the Code, it must receive an entirely different construction from what it would if standing

alone. Said last-named section is as follows: "Every office shall become vacant upon the happening of either of the following events: * * * the death of the incumbent; * * * his refusal or neglect to take his oath of office * * * within the time prescribed by law. * * *" In determining the force of these statutes this well-settled rule must be borne in mind: that forfeitures are abhorred by the courts, and that, when it is reasonably possible so to construe the law as to avoid a forfeiture, such construction will be adopted. If, as we have seen, the first section above quoted is clearly declaratory when standing alone, the last section above quoted might be held to have been enacted in view of such construction of said first section, and the legislature to have intended in said last section by the words "within the time fixed by law" not within 15 days as named therein, but, within the time which the court would hold to be covered by said section when construed as declaratory, and not mandatory. With such a construction of section 3063 all difficulty would be done away with, and there would be nothing in it to change the rule of construction which would otherwise obtain as to said section 2708. Said section 3063 is found within the chapter relating to the filling of vacancies, and provides what facts shall be sufficient to authorize the proper authority to exercise its powers in that regard. But it does not follow that the person elected has lost all right by reason of his failure to qualify. The object of such provision will be fully accomplished by holding that such failure to qualify does not in itself work a forfeiture of the right to the office, but simply authorizes the proper authority to declare such forfeiture, and fill the office by appointment. By this construction force would be given to every word in said section 3063, and the usual construction preserved as to the other section in question. Thus construed, the proper authority would at any time after the expiration of the 15 days prescribed by the statute have the power to declare a vacancy, and at once fill the same by appointment, and, this having been done, the right of the person elected to the office would be determined and ended; but until such action was taken the person elected could, by qualifying within any reasonable time after notice of his election, make perfect his title.

If this were a new question, and if we were to take as the foundation of our decision the fact that said section 2708 would, if standing alone, be construed as declaratory, and would have been substantially complied with by qualification within a reasonable time, instead of within the letter of the statute, this construction of section 3063 would be more reasonable, and would give better force to all the words of both statutes, than would that contended for by the relator. It must be borne in mind in this connection that these two sections are not parts of the same act, and a different rule of construction will obtain than would if the substance of section 3063 had been embodied as a part of section 2708. If the legislature had provided in a single section that a person must qualify within 15 days, and that, if he did not do so, his office should be vacant, there would be much greater force in the argument of relator than under the law as it stands. There have been numerous adjudications bearing more or less directly upon the question here involved, some of which seem to warrant the contention of each of the parties to this action. We shall not attempt a general review of the cases, but shall content ourselves with a brief examination of the question in the light of the authorities. Mechem on Public Officers lays down the general doctrine as follows: "Statutes usually directory and not mandatory. Failure to give bond within time prescribed does not work a forfeiture, even though the statute, expressly provide that upon a failure to give the bond within the time prescribed the office shall be deemed vacant, and may be filled by appointment. It is generally held that the default is a ground for forfeiture only, and not a forfeiture *ipso facto*." The authorities cited by the relator and respondent respectively satisfy us that the conclusion to which Mr. Mechem has come as above stated is warranted thereby. A large list of authorities have been cited by the respective parties as sustaining or contradicting the conclusion of Mr. Mechem as above stated. The leading ones cited sustaining the text above quoted are: State v. Toomer, 7 Rich. Law, 216; Sprowl v. Lawrence, 33 Ala. 674; City of Chicago v. Gage, 95 Ill. 593. Of the long list cited by the relator upon the other side the most of them, though perhaps tending in some degree to sustain the proposition for which they are cited, can easily be distinguished from this case, and can have but little force in deciding this question. For instance, he cites State v. Tucker, 54 Ala. 205, and claims that it not only decides the question adversely to the text above quoted, but that it substantially overrules the case of Sprowl v. Lawrence, *supra;* while as we read this case, it only decides that a judicial determination as to the existence of a vacancy is not a necessary prerequisite to an appointment to fill the same, and to us it seems evident that there was no intention to overrule the case in 33 Ala. above cited, but a direct intention to affirm said case and distinguish it from this. State v. Beard, 34 La. Ann. 273, is also much relied upon, and, if the statute the construction of which was involved in that case were like ours, the text would justify the citation; but such was not the case. The statute construed there provided that the officer should qualify within a definite time named, and that a failure to do so should *ipso facto* work a forfeiture of the office, and it needs no argument to show that the language of the court in construing a statute of this kind could throw no light upon the construction of our statute. The same court had in State v. Peck, 30 La. Ann. 281, under a statute which was not dissimilar from ours, held as contended for by respondent. *In re* Attorney General, 14 Fla. 277, was decided without argument, and upon a proceeding substantially *ex parte*. State v. Matheny, 7 Kan. 327, seems squarely in point, and to justify the contention of relator, but it must be said with reference to that case that the character of statutes of this kind, and the tendency of courts to hold them declaratory, rather than mandatory, received no attention by the judge deciding it. He contented himself with putting his decision solely upon the language of the statute of the State, and, so far as appears from the opinion, the controlling reason therefor may as well have been the fact that one section provided that the bond should be filed within 20 days, and that, therefore, it must be filed within that time, or not at all, as upon the other section, which was something like our section 3063. What the judge says, in deciding People v. Taylor, 57 Cal. 620, is entitled to be little weight, as, so far as it relates to this question, it was pure *dicta*. Of all the cases cited by relator not more than two or three can be said to be squarely in point, and, in our opinion, they would not justify us in sustaining the contention of relator when that of respondent is upheld by such a text writer as Mr. Mechem, and by the authorities cited by him, especially as to do so would be to control and change what is conceded to be the ordinary and proper construction of the section directly

relating to the qualification of an officer by another section upon a different subject, the language of which can be given force without so doing. Under some statutes the qualification is made a prerequisite to the holding of the office, and in fact that which bestows the office. Under such statutes, a failure to qualify within the time specified would no doubt prevent a later assertion of any right thereto. But under our statute it is the election which gives the right to the office, and the qualification is only an incidental requirement for the protection of the public. If the provisions for such qualification are not timely complied with, the public can protect itself by declaring a vacancy and filling the same by appointment, but until such acts have been done the force of the election has not been exhausted, and, upon a compliance with the incidental duty of qualification, is given full force. The construction which we have above contended for seems to us reasonable and proper. Besides, any other construction should be avoided, if possible, on account of the hardship and injustice that would be caused thereby. If the construction contended for by relator is to obtain, then the provisions of our statute must be held to be mandatory, and if they are mandatory they cannot be relieved against. It would follow that, however overwhelming the misfortune or necessity, a failure to qualify within the 15 days would absolutely forfeit the office, notwithstanding the fact that the person elected thereto should have qualified the day after the expiration of such time.

GUARANTY — SALE OF GOODS — NOTICE TO GUARANTOR.—The Supreme Court of Illinois, in Taussig v. Reid, decide a question in the law of guaranty upon which the authorities are in conflict. It is there held that a person who guarantees that another will pay promptly for goods to be purchased is not liable therefor where the purchaser becomes insolvent after the guaranty is executed and the seller gives the guarantor no notice of the purchaser's failure to pay. Craig, J., says:

We shall not attempt to review the authorities at length, nor shall we attempt to harmonize the various decisions bearing upon the question, but we shall content ourselves by stating what we understand to be the law on the subject, as established by the weight of authority. 2 Story, Cont. § 1133, in the decision of the question says: "Wherever the undertaking by a guarantor is absolute, notice is unnecessary; but where it is collateral merely, notice must be given within a reasonable time; otherwise the guarantor will be discharged, unless he is not prejudiced by the want of notice." In Baylies on Sureties and Guaranties (Page 202) the author says: It may be laid down as a general rule that, in case of an absolute guaranty, the guarantor is not entitled to demand or notice of nonperformance, but where the undertaking is collateral, and not absolute, notice must be given in reasonable time, unless circumstances exist which will excuse the want of notice. If the principal is insolvent when the debt becomes due, or default is made so that no benefit could be derived by the guarantor from the receipt of notice, no notice is required. When the payee of a promissory note or a third party executes a contract written on the back of an uncanceled promissory note for the payment of money at a specified time, in which they guaranty the payment of the promissory note at maturity, the holder of the note is under no obligation to demand payment of the maker, and on default of payment to notify the guarantors. The reason is obvious. The contract of the guarantor is absolute and uncanceled, and it required payment by the guarantors upon maturity of the note. This rule is clearly laid down in Gage v. Bank, 79 Ill. 62, and it is well sustained by authority. The principle upon which this doctrine rests is that the contract is absolute, and not conditional or collateral. But does the contract upon which this action is brought rest upon the same principle, or is it to be governed by a different rule? Is the contract in question an absolute contract, or is it collateral or conditional? By the terms of the agreement, the appellants guarantied appellees payment to the amount of $1,500 for goods purchased, or for goods which might thereafter be purchased, of them by Mathilde Zuckerman. It is not claimed that any liability exists on account of goods purchased before the execution of the guaranty, so that the words embraced in the guaranty, "for goods purchased," have no special bearing in construing the agreement. It will be observed that the amount of the goods which might be purchased, nor the time during which the deal between Mrs. Zuckerman and appellees should continue, was not mentioned nor determined. The contract did not compel Mrs. Zuckerman to purchase, or appellees to sell, a dollar's worth of goods. They could deal with each other as much or as little as they might desire or as they might see proper. After the guaranty was executed, if appellees chose not to sell Mrs. Zuckerman any goods, it could not be claimed that an absolute guaranty existed, because there was no debt upon which it could operate. How can a guaranty be absolute, where it is uncertain whether a debt will ever exist to which it could apply? We think it is manifest that the guaranty was not an absolute undertaking, but, on the other hand, the contract in question was a continuing guaranty of a debt to be created in the future of an indefinite amount, depending entirely upon the will of appellees and Mrs. Zuckerman. In Douglass v. Reynolds, 7 Pet. 113, where an action was brought on a guaranty of $8,000 on account of the advancement of cash, or acceptance or indorsement of the principal's paper, to assist him in business, it was held that demand of payment and notice to the guarantors was required. It is there said: "By the very terms of this guaranty, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. • • • The creditors are not, indeed, bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the nonpayment." In McDougal v. Calef, 34 N. H. 534, in an action on a guaranty for goods purchased, it was held that, where the undertaking was absolute, notice is unnecessary; but, where it is collateral merely, notice must be given within a reasonable time, otherwise the guarantor will be discharged, unless he be not prejudiced by the want of notice. In Smith v. Bainbridge, 6 Blackf. 12, in an action against a guarantor for goods sold to another, the contract was held to be collateral. It is there said: "Letters of credit • • • frequently state in express terms that, if the third party do not pay, the writer will. But the insertion or omission of such statement is not the test by which to determine the character of the contract. If the writer states that he will guaranty the payment of the goods to be afterwards sold to another, or that he will see the goods paid for, or that he

will be security for the payment, the promise is only collateral." In same case it was also held that demand of payment from the principal and notice of nonpayment to the guarantor was required. In Babcock v. Bryant, 12 Pick. 133, where an action was brought on an agreement which read as follows: "New Bedford, Nov. 20, 1826. This is to certify that I, the subscriber, do hereby agree to be responsible and pay Messrs. Babcock & Allen for whatever goods have been or may be delivered to Thos. C. Cole,"—in passing upon the obligation of the parties to the contract the court said: "The question is whether the promise is to be considered as an original or a collateral undertaking. We think it is the latter. · · · The claim of the plaintiffs is for goods delivered after the making of the promise, for which Cole gave to them his negotiable note. If he were not the principal debtor, it is difficult to account for the plaintiffs having taken the note of him. They must have understood that he was liable in the first instance. It would follow that the meaning of the parties to the contract now in question was that the defendant was to be liable to pay if the principal debtor did not, and if the defendant should have reasonable notice of the default of the principal." In Mussey v. Rayner, 22 Pick. 223, which was an action on a guaranty, it is said: "The general rule of law on this subject seems now to be well settled, requiring that, in cases of a written guaranty for a debt yet to be created, and uncertain in its amount, the guarantor should have notice, in a reasonable time, that the guaranty is accepted, and that credit has been given upon the faith of it." See, also, Allen v. Pike, 3 Cush. 238; Norton v. Eastman, 4 Greenl. 521; Howe v. Nickels, 22 Me. 175; 2 Pars. Cont. 28. Here the appellants were apprised when they executed the guaranty that it was accepted by appellees; no further notice of acceptance was therefore required. But while the testimony disclosed that Mrs. Zuckerman became insolvent on the 24th day of November, 1887, no notice of her default in payment was furnished to appellants before her failure. We think that the decided weight of authority establishes the rule that, in case of a collateral continuing guaranty like the one in question, reasonable notice of the default of payment on the part of the principal debtor should be given to the guarantor, and the guarantor, will be discharged from payment, so far as he has sustained loss or damage resulting from a failure of the creditor to give him such notice. Tied. Com. Paper, 421. Cases may arise where notice would result in no benefit whatever to the guarantor; for example, where the principal debtor was insolvent when the guaranty was executed, and remained in that condition. In such cases the failure to give notice could result in no loss to the guarantor, and could not be relied upon as a defense to an action on the guaranty. But, where the guarantor may be able to protect himself, notice of default in payment imposes no unreasonable hardship on the creditor, and every principle of commercial usage requires that it should be given.

CRIMINAL LAW—NEW TRIAL—MISCONDUCT OF JURY—TESTIMONY OF JUROR.—The Supreme Court of California, in People v. Murray, hold that where defendant was convicted of murder, and on appeal the supreme court reversed the order of the court below denying a new trial, with instructions to the lower court "to rehear the motion, allowing defendant to introduce the evidence excluded on the former hearing, and the people to rebut the same by other evidence if it is desired," and the motion was again heard and defendant was permitted to introduce evidence that the jury read newspaper articles during the trial, which, it was claimed, tended to influence their verdict, the trial court properly permitted the people to show by the jurors themselves that the newspaper articles had not influenced their verdict. De Haven and Harrison, JJ., dissent. Foote, C., says:

In the former decision this court said: "An attempt on the part of any person, whether through the medium of a newspaper, or otherwise, to influence a jury by any improper means to bring in a verdict against a defendant is a palpable violation of his right to a fair and impartial trial, and it appears to the court to have had such an effect a new trial should be granted. There can be no doubt as to the intention or palpable effect of the articles above set out. It was the clear intention of the publishers of this paper to intimidate the jury, and, by abusing other jurors who had returned verdicts of acquittal, to induce them to find the defendant guilty, and impose upon him the exterme penalty of the law. Whether they had that effect upon the jury or not was a question that the defendant had a right to have determined by the court on his motion for a new trial. The defendant should have been allowed to make the proof, with leave to the people to show, if possible, that these particular articles were not read by the jury, or, if they were, that they were not in any way influenced by them. People v. Goldenson, 76 Cal. 328, 353, 19 Pac. Rep. 161." The evidence of the jurors was in support of their verdict, and it is plainly evident the appellate court intended that the trial court should permit the defendant to introduce the evidence he did on the hearing on the motion, and that the people might show, if they could, either that the prejudicial articles in the newspaper were not read by the jury, or that, if they had read them that "they were not in any way influenced by them." In obedience to this command of the superior tribunal, the court below allowed the people to rebut what might be a presumption that the jury were influenced by the articles which they had read, and to show by their evidence, if it could be done, that the jury had not been thus influenced, and thus sustain their verdict. This view of the matter is in accordance with the case of People v. Goldenson, 76 Cal. 352, 19 Pac. Rep 161, and cases cited, where it is said: "One of the grounds upon which defendant asked for a new trial was that the jury had been guilty of misconduct, by which a fair consideration of the case had been prevented. The substance of the misconduct charged consisted in the jurors having disobeyed the admonition of the court about reading newspaper articles during the trial, which reflected on the defendant. All of the jurors filed affidavits denying fully the charge of misconduct preferred, and insisting that no admonition of the court had been disobeyed, and that no newspaper articles, or anything else, save the evidence and the charge, influenced them in finding their verdict. These affidavits were allowable, and are conclusive upon the point made. People v. Hunt, 59 Cal. 430; People v. Dye, 62 Cal. 523." In thus following the views of the appellate

court we perceive no prejudicial error on the part of the court below, and advise that the order denying a new trial be affirmed.

CONTRACTS—PUBLIC POLICY—RESTRAINT OF TRADE.—In Texas Standard Cotton Oil Co. v. Adoue, 19 S. W. Rep. 274, decided by the Supreme Court of Texas, plaintiffs, representing four cotton seed mills, and defendants, representing a large number of like mills, all independent dealers in cotton seed, and manufacturers of products therefrom, entered into a contract which provided that plaintiffs, in consideration of "covenants" therein, should deliver to defendants the entire yield of their mills, and defendants guaranteed plaintiffs a certain profit per ton. The prices to be paid for seed cotton were established, and were to be changed only by "mutual agreement of the parties." Defendants were authorized to establish from time to time "the minimum prices at which all meal cake and lint produced at plaintiffs' mills shall be sold," and that plaintiffs "shall not purchase any seed, or ship any from" a certain place, and a specified proportion of seed shipped from certain other places to be "subject to be bought by" defendants. It was held, in an action to recover the net profits, under the guaranty, that the contract was void, as being in restraint of trade, and plaintiffs could not recover. Upon the law applicable to the case, Marr, J., says:

We can scarcely conceive how mere territorial limits can be the controlling test in all instances of the legality of the restraints imposed upon the ordinary course of trade. This criterion may do very well when applied to the occupation or profession of one man, or even a few individuals, for neither their labor, industry, business, nor services may be so necessary to the public as not to be dispensed with without inconvenience or injury. It appears to us, however, that the case is very different in regard to trade or commerce in those articles of prime necessity, or even of very frequent use among a large number of people in any given locality. Does any one doubt that a combination of a number of most extensive dealers in flour, meal, or oil, etc., in one great city to sell those commodities at only one price, or not at all, within the limits of that city, would affect the interests of the public, and perhaps also some of the individual dealers, much more extensively and disastrously than a similar agreement extended to a much greater area of country, but in which only a very few people reside or require such articles? It would seem that the injurious effects upon the public interests would be in proportion to the number of people affected by the restrictions, though we are not unaware that this position has not been deemed tenable by some of the authorities in cases where the right to exercise a trade or profession within a particular district or locality has been restricted by contract. Mallan v. May, 11 Mees. & W. 653. But see Duffy v. Shockey, 11 Ind. 70; 1 Smith, Lead. Cas. 183; Angier v. Webber, 92 Amer. Dec. 751. We think that territory cannot be the sole contest, though in the present instance the contract embraces such extensive territory and such a number of localities as to bring i even within that rule. In determining the reasonableness of the restraint, the effect upon the interest of the public is a better test. In the case of Morris v. Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 185, the Supreme Court of Pennsylvania quote with approval the following language of Tindal, C. J., in Horner v. Graves, 7 Bing. 743: "We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection as to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatsoever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is, in the eyes of the law, unreasonable. What is injurious to the public interest is void on the ground of public policy." The court also recognizes the doctrine that the "public interest is superior to private interest," and that even as to "contracts for the limited restraint of trade the courts start with the presumption that they are illegal unless shown to have been upon adequate consideration, and upon circumstances both reasonable and useful." The court furthermore said that, "testing the present contracts by these principles, the restrictions laid upon the production and price of coal cannot be sanctioned as reasonable, in view of their intimate relation to the public interests. The field of operation is too wide, and the influence too general. The effect produced on the public interests leads to the consideration of another feature of great weight in determining the illegality of the contract, to wit, the combination resorted to by the five companies. Singly, each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though that might have been detrimental to the public interest. There is certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a connection in the conduct of others." We approve of these observations, but do not sanction a combination of individuals to stifle competition. The court then proceeds, in the next place, to discuss at length the extent and scope of the combination, and denounce it as a conspiracy, intended to control the coal markets of the country by stifling competition, and therefore void. "Whatsoever a man may lawfully forbear, that he may oblige himself against, except where a third person is wronged, or the public is prejudiced by it." Metcalf, Cont. 232. This language was adopted by the Supreme Court of Ohio in Crawford v. Wick, 18 Ohio St. 203, which involved the construction of a contract in restraint of trade. We refer to this decision as bearing upon those provisions in the contract in hand which prohibit the parties from purchasing cotton seed in the specified localities, etc. In the case of Arnot v. Coal Co., 68 N. Y. 566, the court uses the following language: "If an absolute purchase had been made by the defendant of the Butler Coal Company of any specified quantity of coal, or even of all the coal which the Butler Company could produce, that contract would have been legal, notwithstanding that the object of the purchasers was to secure a monopoly, and that the vendor knew it. He had a right to dispose of his goods, and, under certain limitations, a vendor may recover for their price,

notwithstanding that he knows that the vendee intends an improper use of them, so long as he does nothing to aid in such improper use, or in the illegal plan of the purchaser. But (and this is a very important distinction) if the vendor does anything beyond the sale to aid the illegal scheme of the vendee, he renders himself *particeps criminis*, and cannot recover for the price," etc. Elsewhere in the opinion it is said that "every producer or vendor of coal er other commodity has the right to use all legitimate efforts to obtain the best price for the articles in which he deals. But when he endeavors to artificially enhance prices by suppressing or keeping out of the market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements are even more pernicious than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy, and illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour, or other indispensable commodities, might be artificially raised to a ruinous extent, far exceeding any naturally resulting from the proportion between supply and demand."

We have already shown that the agreement under consideration does not evidence simply a contract made in good faith for the sale by the owners of the "four mills" to the Howard Oil Company of the products of their mills. In the case of Bagging Co. v. Kock, 14 La. Ann. 168, it was held that an agreement between eight commercial firms in the City of New Orleans, whereby they bound themselves for the period of three months not to sell India bagging, except with the consent of a majority of them, was void. The decision seems to have been based, from the authorities cited, upon the principle of both the civil and common law. The court said: "The agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public lic order, and cannot be enforced in a court of justice." Nowhere, perhaps, is the duty of the courts in regard to contracts of the character we are considering, as well as the present state of the common law (in the absence of statute), even under "the modern doctrine," better defined than in the opinion of the Supreme Court of Michigan in Raymond v. Leavitt, 9 N. W. Rep. 525 (cited by Whart. Cont. page 612), from which we cull the following: "We do not feel called upon to regard so much of the common law to be obsolete as treats these combinations as unlawful, whether they should now be held punishable as crimes or not. * * * There may be difficulties in determining conduct as in violation of public policy where it has not before been covered by statutes as precedents. But in the case before us the conduct of the parties comes within the undisputed censure of the law of the land, and we cannot sustain the transaction without doing so on the ground that such dealings are so manifestly sanctioned by usage and public approval that it would be absurd to suppose that the legislature, if attention were called to them, would not legalize them. We do not think public opinion has become so thoroughly demoralized; and, until the law is changed, we shall decline enforcing such contracts. If parties see fit to invest money in such ventures, they must get it back by other than legal measures." The attention of our own legislature seems to have been "called" to the subject, but, instead of "legalizing" such combinations or conspiracies in restraint of trade, the legislature has denounced them as felonies, thus manifesting the public sentiment in this State. This was done, however, subsequently to the execution of this contract in hand. Space forbids us to make any more extracts from the opinions to be found in the adjudicated law. We are of the opinion that the contract under consideration, and which was entered into by independent dealers and manufacturers in the same line of business, as already stated, imposed or attempted to impose unreasonable and too extensive restrictions upon trade and the freedom of the parties thereto, and was consequently contrary to public policy and void. We think that its manifest purpose and natural tendency were to prevent competition in too many localities, and to reduce the price of the raw materials upon the one hand as they might choose, and upon the other to enhance that of manufactured products by artificial means, to the disadvantage and detriment of the public. 1 Whart. Cont. § 442, and notes; Callahan v. Donnolly, 45 Cal. 152; Salt Co. v. Guthrie, 35 Ohio St. 666; Sampson v. Shaw, 101 Mass. 145; Wright v. Ryder, 36 Cal. 342, 361; Hooker v. Vandewater, 47 Amer. Dec. 258; Craft v. McConoughy, 79 Ill. 346; Leonard v. Poole, 114 N. Y. 371, 21 N. E. Rep. 707 (based on statute.) See, also, for a collation of the authorities, note to Angier v. Webber, 92 Amer. Dec. 751.

CRIME AND ITS DIVISIONS.

1. *Definition.*—The word crime is synonymous with criminal offense, *i. e.*, an offense or transgression of law punishable in a criminal proceeding.[1] Generally speaking, whatever is punishable in a criminal proceeding is a crime.[2] The general policy of the common law is to embrace within the scope of the term all such conduct as either directly militates against the public peace and security,[3] or embodies an element of trespass against private rights indirectly affecting the public security.[4] Common law crimes are not, however, always accurately defined. Whether a certain thing is a crime must sometimes be ascertained by reasoning from analogy.[5] In determining the scope of offenses created by statutes, regard must likewise be had to the general policy of the common law.[6]

[1] *In re* Lucas, 29 W. C. Q. B. 81, 92; Lehigh Co. v. Shock, 113 Pa. St. 373; People v. Hanrahan, 75 Mich. 611, 619; *In re* Bergin, 31 Wis. 384, 386; *Cf.* Mann v. Owen, 9 B & C. 595.

[2] State v. Peterson, 41 Vt. 501, 504.

[3] Wade v. Circuit Judge, 75 Mich. 488; State v. Bishop, 7 Conn. 180, 185.

[4] 2 East Crim. Law, 818; R. v. Eagleton, 8 Cox C. C. 59; Resp. v. Powell, 1 Dall. 47; People v. Stetson, 4 Barb. 151, 154; People v. Miller, 14 Johns. 371; Lambert v. People, 5 Cow. 578; Perkins v. State, 67 Ind. 270.

[5] Smith v. State, 6 Gill, 425, 428.

[6] Lane v. Cotton, 12 Mod. 472, 486; Com. v. Drew, 19 Pick. 179, 185; People v. Stetson, 4 Barb. 151, 154.

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2. *Divisions.*—Crimes, according to the degree of turpitude, are divided into treasons, felonies and misdemeanors. The term felony is said anciently to have included treason.[7]

3. *Treason.*—Treason, the most heinous of these classes, was divided into petit and high treason; but now what is meant by treason is high treason. By the ancient common law there were several forms of petit treason which, by 25 Edw. III, stat. 5, ch. 2, were reduced to the three: the killing by a servant of his master, by a wife of her husband, by an ecclesiastic of a prelate to whom he owed obedience. In 1828 these petit treasons were abolished by 9 George IV, ch. 31, sec. 2, which provides that every offense which formerly would have amounted to petit treason should thereafter be deemed murder only. Statutes in some States have expressly abolished the offense of petit treason, and it is nowhere recognized in the United States. Treason against the United States can consist "only in levying war against them, or in adhering to their enemies, giving them aid and comfort."[8] Treason is also a common law offense in each State, but the crime is generally limited and defined in the State constitutions in the same manner as in the constitution of the United States.

4. *Felony.*—Felony, next in grade of turpitude to treason, is any offense which, by statutes or the common law, is punishable with death, or to which the old English law attached total forfeiture of lands or goods, or both.[9] If, by the terms of a statute, the infliction of the punishment of death is discretionary, the offense is, not felony, but misdemeanor.[10] The term now signifies the degree or class of crime committed, rather than the final consequences of its commission.[11]

Arson, burglary, larceny, murder and manslaughter, piracy, rape and robbery are felonies at common law. The grade of mayhem and sodomy is doubtful. Statutory felonies must either be created by express words or clear implication. An offense cannot be made a felony by doubtful or ambiguous words.[12]

5. *Misdemeanor.*—All offenses less than felony are classed as misdemeanors.[13]

6. *High Crimes and Misdemeanors.*—The words "high crimes and misdemeanors" have been held to denote such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet, owing to some technical circumstance, do not fall within the definition of felony.[14] When these words are used in prosecutions by impeachment,[15] they are said to have no definite signification, but to be used merely to give greater solemnity to the charge.[16]

7. *Misprision.*—The term misprision is sometimes used in a general, somewhat vague sense, to denote any considerable misdemeanor which has not a name given to it by law,[17] a high misdemeanor.[18]

8. *Infamous Crimes.*—The term infamous crime, as used in the constitution of the United States, denotes a crime which renders the offender liable to an infamous punishment—death, pillory, whipping, or confinement in the State prison or penitentiary.[19] An infamous crime, at common law, meant such a crime as involved moral turpitude, or such as rendered the offender incompetent as a witness, upon the theory that its commission betokened such depravity as rendered him unworthy of credit. It may, in general, be said to include treason, felony and all offenses of the grade of misdemeanor founded in fraud and coming within the general notion of the *crimen falsi* of the Roman law.[20]

9. *Merger.*—According to the strict common law doctrine, where an offense is within the definition of both a higher and lower one of the three divisions of crime, the lower grade of offense is merged in the higher, and the act or conduct can only be punished as the higher grade of crime;[21] hence, if a stat-

[7] 3 Inst. 15, Co. Litt. 391*a*, 1 East P. C. 334, 336, 1 Hale P. C. 378, 498; Hawk. P. C. ch. 25, § 2; U. S. v. Coppersmith, 2 Flip. 546, 551.

[8] Const. U. S. art. 3, § 3.

[9] 1 Bishop Crim. Law, § 615; Drennan v. People, 10 Mich. 169, 182; Fassett v. Smith, 23 N. Y. 252, 257; Lynch v. Com., 88 Pa. St. 189, 192.

[10] Gibson v. State, 54 Md. 447, 453.

[11] Brugnier v. U. S., 1 Dak. 5, 7.

[12] Gibson v. State, 54 Md. 447, 453.

[13] State v. Phelps, 9 Md. 21; *In re* Glenn, 54 *Ib.* 572, 604.

[14] State v. Knapp, 6 Conn. 415.

[15] Const. U. S. art. 3, § 2, cl. 3.

[16] 6 Am. L. Reg. (N. S.) 647.

[17] 3 Inst. 36; 1 Hawk P. C. 60; 4 Black. Com. 119.

[18] 4 Black. Com. 121.

[19] *Ex parte* Wilson, 114 U. S. 417; Mackin v. U. S., 117 *Ib.* 348; Parkinson v. U. S. 121 *Ib.* 281; U. S. v. De Walt, 128 *Ib.* 393.

[20] 3 Greenl. Ev. §§ 372, 373; *Ex parte* Wilson, 114 U. S. 417, 423; Black v. State, 2 Md. 376, 380; State v. Bixler, 62 *Ib.* 354.

[21] R. v. Harwood, 1 East P. C. 411.

ute creates a felony of what was before a misdemeanor, or misdemeanor of what was before a felony, there can be no subsequent prosecution of the act for what it was before the statute. This doctrine has been much relaxed, if not repudiated, by modern decisions.[22]

10. *Attempts.*—An attempt to commit a crime of any grade, existing either at the common law or under a statute, is a misdemeanor. An attempt is an act tending towards the accomplishment of a purpose which exceeds a mere intent or design and falls short of the execution of it.[23] The act of endeavor must be adapted to the consummation of the crime;[24] it must be a direct commencement of the execution.[25]

In a general sense, a solicitation to commit a crime is a misdemeanor; but it must amount to something more than mere solicitation to be indictable.[26] LEWIS HOCHHEIMER.

[22] R. v. Button, 12 Q. B. 929, s. c., 3 Cox. C. C. 229; R. v. Neale, 1 Den. C. C. 36; Comm. v. Dean, 109 Mass. 349.

[23] Kelly v. Com., 1 Grant (Pa.), 484; Stabler v. Com., 95 Pa. St. 318; State v. Wells, 31 Conn. 210, 212; Gray v. State, 63 Ala. 66, 73; Lamb v. State, 67 Md. 524, s. c., 26 Am. L. Reg. (N. S.) 641-654.

[24] State v. Clarissa, 11 Ala. 60.

[25] Lewis v. State, 35 Ala. 380, 388.

[26] 4 Black. Com. 16, 26 Am. L. Reg. (N. S.) 641-654.

INJURIES BY FIRE DEPARTMENT—LIABILITY OF CITY THEREFOR.

DODGE V. GRANGER.

Supreme Court of Rhode Island, Feb. 27, 1892.

A declaration alleging that some members of defendant city's fire department, for the purpose of more easily cleaning the engine house to which they were attached, permitted a ladder to project across the sidewalk in front of the engine house for an hour, and that plaintiff, while passing, came in contact therewith through no fault of hers, and was injured, states no cause of action, as the members of the fire department were acting in the line of their duty.

TILLINGAST, J.: This is an action of trespass on the case to recover damages from the city of Providence for injuries resulting from the alleged negligence of said city in failing to keep a certain public street or highway known as "Exchange Place" in suitable repair, so that it should be safe and convenient for travelers. The declaration sets out that some of the members of the fire department of said city connected with the fire engine house known as "Station No. 1," situated on said Exchange place, for the purpose of more easily cleaning said station, placed one of the hook and ladder trucks belonging to said city, and in the care and under the control of said fire department, so that one of the ladders projected across the sidewalk directly in front of said engine house, where it was allowed to remain for the space of, to-wit, one hour, and that the plaintiff while passing along said sidewalk, between 4 and 5 o'clock in the afternoon, in the exercise of due care, came in contact with the said ladder, and was injured. It also sets out that the members of said fire department had been for a long time prior thereto, to-wit, for the space of 10 years prior to said accident, in the frequent and daily habit of placing their trucks so that the ladders thereof would project across said sidewalk in front of said house, without warning to the public, at all hours of the day. The defendant demurs to the declaration, on the ground that the members of the fire department are public officers, for whose negligent acts the city is not liable. The plaintiff, while admitting the general doctrine contended for by the defendant in support of its demurrer, yet claims that the case stated in the declaration is not governed by the rule announced, for the reason that the act complained of was not one which was done at a fire, or on the way to or returning from a fire, but was the negligently placing of a truck at said station, and leaving it there so that the projecting ladders formed an obstruction to the street and sidewalk, for which the city is liable the same as if said obstruction had been placed there by a mere stranger. We do not think that the plaintiff's position is tenable. It is the duty of the fire department to take care of its apparatus, and keep it in proper condition for use, as well as to use it for the extinguishment of fires; and the members of said department are acting in the line of their duty while so taking care of said appliances, as fully as when actually engaged in extinguishing fires. The efficiency and usefulness of such a department must necessarily depend very largely upon the diligence exercised in the management and care of its appliances when not in actual service, so that the same may at all times be in proper condition for instant use. The cleaning of the station house referred to in the declaration was evidently necessary and proper, both on account of the health and comfort of the firemen stationed there, and also for the better protection and preservation of said appliances. It is evidently necessary that the horses belonging to the department should be taken care of and exercised, that hose and hydrants should frequently be tested, and that the entire apparatus should be kept in the best of repair. And we fail to see that the city is any more responsible for the negligence of the members of said department when in the performance of these duties than when in the performance of the more important duty of extinguishing fires. The case of Welch v. Village of Rutland, 56 Vt. 228, is quite similar in several respects to the case at bar. In that case a hydrant connected with the aqueduct pipe having become frozen, one of the assistant engineers was

directed by the village trustees to thaw out the same at the expense of the village. This he proceeded to do, using for the purpose the steam fire engine, belonging to the fire department. The water which was allowed to escape from the hydrant in order to clear it of broken ice froze in the street, and the plaintiff, falling thereon, was injured. But it was held that the plaintiff could not recover. The court said: "The propriety and necessity of thawing out the hydrants is not disputed; and putting them in condition for effective service in case of a fire which was liable to occur at any moment was not only directly in the line of duty prescribed by the ordinance just quoted, but also as important a part of the general duty to protect from and extinguish fires as would be the laying of hose or hauling of fire apparatus while a conflagration was in progress." The court further said: "If the defendant were liable in this case, it would be impossible to avoid a similar conclusion in a case of a negligent or careless act in putting the hydrants in order for efficiency, or in the use or repair of any of the fire apparatus, or, indeed, any negligence or carelessness of firemen while in active service at a fire; and that would be a state of law which, it must readily be seen, cities and villages could not live under." In Fisher v. Boston, 104 Mass. 87, the city was held not to be liable for a personal injury to the plaintiff caused by the bursting of the hose attached to a fire engine. Gray, J.: said: "In the absence of express statute, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town house or a public way. It makes no difference whether the legislature itself prescribes the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by by-law. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit from, in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation or its agents." In the case of Burrill v. City of Augusta, 78 Me. 118, 3 Atl. Rep. 177, the plaintiff alleged that the officers of the fire department of the defendant city, having occasion to uses steam fire engine belonging to said city for a necessary purpose, after said use carelessly and negligently allowed the engine to stand within the limits of a public street in said city, and while so standing negligently drew the fire, and permitted the steam to escape therefrom with a great noise, whereby the plaintiff's horse, which she was rightfully driving upon the street, was frightened. ran away, and the plaintiff, without any fault on her part, was thrown to the ground and injured. The defendant demurred to the declaration, and the demurrer was sustained, on the ground that a municipal corporation is not liable for the negligent acts of its fire department while in the discharge of their official duties. See, also, 7 Amer. & Eng. Enc. Law, 997, 998, and cases cited; Dill. Mun. Corp. (4th Ed.) § 976, and cases cited; Aldrich v. Tripp, 11 R. I. 141; Wilson v. Newport, 13 R. I. 454. We do not wish to be understood to hold that a city may not be liable for damages resulting from an obstruction wrongfully placed and unreasonably continued in a highway by the fire department; for it being the duty of towns and cities to keep their highways in repair, so that the same shall be safe and convenient for travelers, it follows that a liability would arise for permitting a nuisance to exist in a highway after due notice thereof, no matter by whom it should be caused. But we do not think that the acts charged in the plaintiff's declaration, under the circumstances therein set forth, can be held to constitute such a nuisance. The question raised as to whether the declaration sufficiently shows that defendant had notice of the alleged obstruction, therefore, is of no importance. Demurrer sustained.

NOTE.—The doctrine of *respondeat superior* as applied to municipal corporations is considered in the note to Bryant v. St. Paul, 21 Cent. L. J. 33, 35, and it will be the purpose of the writer in this note to review only such cases as relate directly to the liability of municipal corporations for the negligence of their fire departments, together with such analogous cases as have been decided since the note to the case referred to was written.

As shown in the note to the case of Bryant v. St. Paul, *supra*, there is a well settled distinction between the acts of municipal officers in the discharge of a public or *quasi* public or legislative duty cast upon the municipality by the State, and the acts of its officers in the discharge of a private duty to the corporation. In the former case the municipality is generally free from liability, and in accordance with this rule it is held that a city is not liable for the negligence of members of its fire department in the absence of a statute, unless the act was directly ordered by the corporation. Burrill v. Augusta, 78 Me. 118; Grube v. St. Paul, 34 Minn. 402, and authorities hereinafter cited. See also Fisher v. Boston, 104 Mass. 93; Maximilian v. Mayor, 62 N. Y. 160, 20 Am. Rep. 468; Condict v. Mayor, 10 Cent. L. J. 213; Haight v. New York, 24 Fed. Rep. 93; Greenwood v. Louisville, 13 Bush. 226; Pollock v. Louisville, 13 Bush. 221. Thus, it is not liable for the negligence of its firemen in running over a person on their way to a fire. Hafford v. New Bedford, 16 Gray, 297. Nor for personal injuries caused by the bursting of a hose at a fire. Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196. So, in the absence of a statute, a municipal corporation is not liable for injuries to property caused by the negligence of the fire department in using or failing to keep in repair the fire engines and apparatus. Wheeler v. Cincinnati, 10 Ohio St. 19, 12 Am. Rep. 368; Howard v. San Francisco, 51 Cal. 52; Wilcox v. Chicago, 107 Ill. 334; Bigelow v. Randolph, 14 Gray, 541; Jewett v. New Haven, 38 Conn. 368, 9 Am. Rep. 382; Elliott v. Philadelphia, 75 Pa. St. 347, 15 Am. Rep. 591; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Edgerly v. Concord, 59 N. H. 78; Wild v. Pattison, 47 N. J. L. 406; Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760. "The exemption from

liability in these and the like cases," says Judge Dillon, "is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed and paid by the city corporation, are not the agents and servants of the city for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city without being expressly given; the maxim of *respondeat superior* has, therefore, no application." 2 Dillon Munic. Corp. Sec. 976. It is equally well settled that a city is not liable for failure to provide and keep in repair suitable engines, hose and public cisterns. Heller v. Sedalia, 53 Mo. 150, 14 Am. Rep. 444; Robinson v. Evansville, 87 Ind. 334; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Brinkmeyer v. Evansville, 29 Ind. 187; Horn v. Des Moines, 63 Iowa, 447; Weightman v. Washington, 1 Black, 39, 49; Torbush v. Norwich, 38 Conn. 225, 9 Am. Rep. 395; Grant v. Erie, 69 Pa. St. 420, 8 Am. Rep. 272. See also Elliott on Roads and Streets, 465, 490. And it has also been held that a city is not liable for cutting off the water from a hydrant and thus preventing the extinguishment of a fire. Tainter v. Worcester, 123 Mass. 311, 25 Am. Rep. 90; Davis v. Montgomery, 51 Ala. 130. So the fact that the city owns the water works or has a contract with the water works company protecting it does not change the rule and make the city liable. Mendel v. Wheeling, 28 W. Va. 233; Black v. Columbia, 19 S. Car. 412; Van Horn v. Des Moines, 63 Iowa, 447. See also, New Orleans v. Crescent, etc. Co., 25 La. Ann. 390.

In the case of Smith v. The City of Rochester, 76 N. Y. 506, the court reached the same conclusion as to the non-liability of the city upon a peculiar state of facts, by applying a somewhat different principle. The common council had appointed a committee to make arrangements for the celebration of an anniversary and the committee directed the fire department to appear in front of the city hall at midnight. A hose cart, which was being driven rapidly on its way to the designated place, was negligently driven against the plaintiff. The court held that the use of the hose cart for such a purpose was unauthorized and that the city was not liable for the injury to the plaintiff. So in the case of Turner v. The City of Indianapolis, 96 Ind. 51, it was held that the city was not liable to a fireman for an injury to him caused by running over an obstruction in a street while on the way to a fire, there being nothing to show that the city had or ought to have had any knowledge of the obstruction, but the court intimated that the city would have been liable if it had been negligent in leaving the obstruction in the street, and in the case of City of Lafayette v. Allen, 81 Ind. 116, the city was held liable for injury to a fireman caused by the bursting of an engine from defects therein which were known to the city but unknown to the fireman. Compare Wild v. Paterson, 47 N. J. L. 406. The case of Kies v. City of Erie (Pa.), 19 Atl. Rep. 942, is very similar to the principal case. A fireman negligently opened the door of an engine house in such a manner as to strike and injure one who was passing by, and it was held that the city was not liable for such injury.

The principle upon which cities are held not to be liable for the negligence of the fireman in the discharge of public legislative or governmental duties has been applied in many analogous cases, most of which are cited and reviewed in the notes to Bryant v. St. Paul, *supra*, and Briegal v. City of Philadelphia, 31 Cent. L. J. 192. There are several more recent cases, however, in which the same principle has been applied. Thus it has been held that a city is not responsible for the negligence of a person employed to enforce an ordinance forbidding dogs to run at large. Culver v. City of Streater, 130 Ill. 238, 30 Cent. L. J. 72, 22 N. E. Rep. 810; Whitfield v. City of Paris (Tex.), 19 S. W. Rep. 566; nor is it liable for the acts of police officers in making arrests and enforcing police regulations. Town of Laurel v. Blue (Ind.), 27 N. E. Rep. 301; Bowditch v. Boston, 101 U. S. 16; Caldwell v. Boone, 51 Iowa, 687; Worley v. Columbia, 88 Mo. 106; Jolly's Admx. v. City of Hawesville (Ky.), 12 S. W. Rep. 313; Burch v. Hardwick, 30 Gratt. 24; Atwater v. Baltimore, 31 Md 462; Peters v. City of Lindsborg, 40 Kans. 654, 20 Pac. Rep. 490; Elliott v. Philadelphia, 75 Pa. St. 347; Little v. Madison, 49 Wis. 605, 11 Cent. L. J. 55; 2 Dillon Mun. Corp. Sec. 975. So, it has been held that a town is not liable for a death of a person caused by the burning of a jai in which he was confined for violating a town ordinance, although the fire resulted from the negligence of the town officers. Brown's Admr. v. Town of Guyandotte, 34 W. Va. 299, 12 S. E. Rep. 707. And in a recent case the general rule is laid down that a municipal corporation is not, ordinarily, liable for the negligent and wrongful act of an officer unless it is made to appear that he was not an independent public officer, and that the wrong complained of was done by such officer in the legitimate exercise of some duty of a corporate nature which devolved upon him by law or by the direction of the corporation. Caspary v. City of Portland, 19 Oreg. 496, 24 Pac. Rep. 1036. See also Atwater v. Trustees, 124 N. Y. 602; Bates v. Rutland, 62 Vt. 178; O'Brien v. City of New York, 15 N. Y. Supp. 520; Bulger v. Eden, 82 Me. 352; McDonald v. Lockport, 28 Ill. App. 157; Prince v. City of Lynn, 149 Mass. 193, 21 N. E. Rep. 296; Barney, etc. Co. v. City of New York, 40 Fed. Rep. 50.

The principal case is correctly decided. The fact that the plaintiff was injured by the act of the firemen in cleaning the engine house does not take the case out of the rule applied in the cases already cited. The firemen were acting in the line of their duty the same as if they had been going to a fire and that duty was a public or governmental one for negligence in the performance of which the city was not liable. But, as intimated in the opinion in the principal case, a different rule would have applied if the obstruction had been of such a nature as to constitute a nuisance and the city had or ought to have taken notice of it in time to remove it. In such a case the liability would not have been on account of the negligence of the firemen but on account of the negligence of the city in failing to remove the obstruction and keep its streets in repair. See Elliott on Roads and Streets, 460-465, 486, note 1.

W. F. ELLIOTT.

BOOK REVIEWS.

THE LAW OF BANK CHECKS.

The above is the title of an admirable work just published by Henry C. VanSchaack, of the Denver bar. The aim of the author, as stated in his preface, is "to present a concise and simple statement of the law in the United States, pertaining to bank checks, embodied in as condensed a compass as is compatible with clearness and accuracy." The book is in no sense

local, but is a work of national character. The clear elucidation of the legal principles applicable to the several branches of this subject is abundantly fortified by reference to the leading American and English authorities, the high character of which bespeaks the exercise of labor and discrimination bestowed upon the work. According to a recent estimate of the United States comptroller, over 95 per cent. of the banking business of this country is transacted through the instrumentality of checks, and the daily increasing use of this species of commercial paper render the methodical analysis given the subject by Mr. VanSchaack valuable to the profession, as well as to those engaged in financial and commercial vocations, to whom we can heartily commend the work.

PROFFATT ON NOTARIES.

The first edition of this book made its appearance in the year 1877, and by reason of the fact that it was and still is the only extant work of this character which covered the laws of all the States it met with the cordial reception and has always maintained a good reputation. The present edition is By John F. Tyler and John J. Stephens, of the San Francisco bar.

Since the publication of the first edition, the questions concerning notaries, their duties and the admissibility of their acts in evidence have become of vast importance throughout the United States and the publication of a new edition is therefore very desirable. The book discusses in concise terms the history of the office of a notary, the appointment of notaries, their office and duties and powers, acknowledgment of deeds, acknowledgment by married women, affidavits, oaths and affirmations, depositions and a very exhaustive discussion of the duties of notaries relative to negotiable paper. There is a chapter on notarial acts as evidence and one on commissioners of deeds.

The appendix also contains forms of acknowledgments, affidavits, depositions, protests and notice, deeds, mortgages, assignments by mortgage, satisfaction of mortgage, chattel mortgage, bill of sale, powers of attorneys, bond, farm lands, contract, building contract, leases and wills. The text is well prepared and the citation of authorities in the notes exhaustive. The work is invaluable to notaries and commissioners of deeds and is of good use to practitioners as well. It is published by Bancroft-Whitney Company, San Francisco.

BOOKS RECEIVED.

A Treatise on the Negligence of Municipal Corporations. By Dwight Arven Jones, Author of "The Construction of Contracts." New York: Baker, Voorhis & Company. 1892.

A Treatise on Appellate Procedure and Trial Practice Incident to Appeals. By Byron K. Elliott and William F. Elliott, Authors of "The Work of the Advocate" and "A Treatise on the Law of Roads and Streets." Indianapolis: The Bowen-Merrill Company. 1892.

A Treatise on Attorneys and Counsellors at Law, comprising the Rules and Legal Principles Applicable to the Vocation of the Lawyer, and those Governing the Relation of Attorney and Client. By Edward P. Weeks, Counsellor at Law, Author of Works on "Mineral Lands," "The Law of Mines, Minerals," etc. Second Edition. Revised and Enlarged by the Adjudications of the Last Fourteen Years. By Charles Theodore Boone, Author of "Law of Corporations," etc. San Francisco: Bancroft-Whitney Co. 1892.

HUMORS OF THE LAW.

Judge—"What does the prisoner say; is he guilty or not guilty?"

Prisoner—"What's the use in my saying 'not guilty,' your Honor? You won't believe me, any how."

Judge (to convicted burglar)—"Have you anything to say before sentence is passed on you?

Burglar—"Yes, your Honor. I want to mention one mitigating circumstance. Just consider, if your Honor pleases, the neat, workmanlike job I made of it."—

An amusing incident occurred in the Circuit Court at West Point Miss., recently. A negro boy being tried for stealing two pairs of trousers, and having no lawyer, Judge Campbell asked him if he desired to speak. He promptly replied in the affirmative, and fired "The boy stood on the burning deck" at the judge and jury.

Judge Biddle, the wit of court house row, had before the bar of justice a woman who wept most bitterly over her misfortunes. Her sobbing shook the court room, and her tears of no mean size, coursed in a great stream down her cheeks to the floor. While she wept thus profusely, a prominent lawyer chanced in, who, seeing the prisoner and hearing her cries, asked of the bench, "What's the matter with her?" "I'm sure I don't know," was the judges reply. Apparently she's waiting to be bailed out."—*Philadelphia Record.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATION—Distribution.—Rev. St. art. 2202, which provides that an executor or administrator, on appealing need not give a bond, unless personally concerned, does not relieve from the duty of giving a bond the guardian of an infant legatee, appealing in behalf of the latter from an order of the county court, making certain distribution under the will.—HUDGINS V. LEGGETT, Tex., 19 S. W. Rep. 387.

2. ADMINISTRATION—Administrator's Bond.—An ad-

ministrator procured an order of the probate court directing him to continue his intestate's business, and afterwards, on the faith of this order, bought goods from plaintiffs on credit. The administrator failed to pay for the goods, and plaintiffs procured an order from the probate court directing the administrator to pay the account out of the assets of the estate, which the administrator refused to do: Held, in an action against the sureties on the administrator's bond, that, as plaintiffs could not look to the general assets for payment, a complaint which failed to allege a *devastavit* by the administrator as to any of the trade assets was insufficient.—STATE V. HUNTER, Ark., 19 S. W. Rep. 496.

3. ADMIRALTY—Priority of Liens.—Liens for salvage and for damage to goods are inferior to the lien of seamen for wages earned on a subsequent voyage, but, being general maritime liens, are superior to those of mortgagees, whether their mortgages were registered before or after the origin of the maritime liens.—THE LILLIE LAURIE, U. S. C. C. (Tex.), 50 Fed. Rep. 219.

4. APPEAL FROM JUSTICE'S COURT.—An appeal will not lie from a judgment entered in a justice's court against defendant by consent.—RADER V. BARR, Oreg., 29 Pac. Rep. 889.

5. ATTACHMENT—Defective Affidavit.—If an affidavit for an attachment is defective in not stating all the statute requires, or if it is false, the court has no jurisdiction to issue the attachment.—MURPHY V. MONTANDON, Idaho, 29 Pac. Rep. 851.

6. ATTACHMENT—Grounds.—Mortgaging property in pursuance of on agreement to secure an accommodation indorser of the mortgagor's note is not a fraudulent disposition of property, so as to warrant an attachment.—GODBE PITTS DRUG CO. V. ALLEN, Utah, 29 Pa c. Rep. 881.

7. ATTORNEYS—Disbarment—Contempt of Court.—The same unprofessional conduct by an attorney may be ground for disbarment, and likewise constitute a contempt of court.—PEOPLE V. BERRY, Colo., 29 Pac. Rep. 904.

8. BUILDING ASSOCIATIONS—Loans to Non-members.—A contract entered into with a building association, organized under the laws of this State, by and through which it may be enabled to evade the statute, and loan its funds to a person not a member or shareholder of the association, is invalid and non-enforceable.—NATIONAL INVESTMENT CO. V. NATIONAL SAVINGS, LOAN & BLDG. ASS'N, Minn., 52 N. W. Rep. 138.

9. CARRIERS — Passenger — Contract of Carriage.—Where a conductor receives from a passenger in money the regular fare to the point of his destination, and is informed at the time that the passenger wishes to be carried to that point, he does not thereby contract to carry him to that point for that fare, if, after going several seats to the rear he returns and demands the additional amount required by a regulation of the carrier because of the passenger's failure to purchase a ticket instead of paying in money, facilities for which pur chase were afforded him at the station at which he entered the train.—LAKE ERIE & W. R. CO. V. MAYO, Ind., 30 N. E. Rep. 1106.

10. CARRIERS—Live Stock Shipments.—A common carrier may, by special agreement, just and reasonable in itself, and fairly made between itself and the consignor of a horse at the time of the shipment, fix the value of such horse, upon consideration that the rate of charges for transportation shall be commensurate with the value of the horse thus ascertained, and may also limit its liability in case of loss to the amount thus agreed upon, even though the loss may be the result of negligence on the part of the carrier, provided said negligence be not gross, wanton, or willful, but cannot wholly exempt itself from liability for loss resulting from negligence.—ZOUCH V. CHESAPEAKE & O. RY. CO., W. Va., 15 S. E. Rep. 185.

11. CARRIERS OF FREIGHT—Storage.—Failure of a carrier to deliver goods on demand, after storage, without lawful excuse, is a breach of the carrier's original contract, for which suit may be brought on that contract.—WILSON V. CALIFORNIA CENT. R. CO., Cal., 29 Pac. Rep. 861.

12. CARRIERS OF GOODS—Joint Owner.—Where a contract of carriage of goods is made with one co-partner or joint owner only, he may sue alone to recover damages for their loss or injury.—MO. PAC. RY. CO. V. SMITH, Tex., 19 S. W. Rep. 509.

13. CHATTEL MORTGAGE — Acknowledgment.—Where a chattel mortgage shows on its face that there are two grantors, composing a partnership, and the acknowledgment purports to be made by the firm, without identifying the person or persons who appeared before the officer, the instrument is not entitled to record, and is invalid as to attaching creditors.—HUGHES V. MORRIS, Mo., 19 S. W. Rep. 481.

14. CHATTEL MORTGAGES — Certificate—Pleadings.—Under Civil Code, § 2957, which requires mortgages on personal property to be "acknowledged, certified, and recorded as grants of real property," a certificate to a chattel mortgage was sufficiently signed, "W. K. J., Secretary," without other words descriptive of official character, where the body of the certificate recited that it was made to "W. K. J., secretary of, the mortgagee in said mortgage named."—YOST V. COMMERCIAL BANK OF SANTA ANA, Cal., 29 Pac. Rep. 858.

15. CHATTEL MORTGAGE—Tender.—Where an assignee of a chattel mortgage seizes the property under a provision in the mortgage authorizing him to take possession whenever he deems himself insecure, a refusal to accept a tender, made by the mortgagor, of the principal, with interest to date and accrued costs, operates to discharge the lien, and a further detention is unlawful.—SHATTUCK V. COLE, Mich., 52 N. W. Rep. 69.

16. CONSTITUTIONAL LAW—Title of Act.—Sess. Laws 1887 (Act No. 264), entitled "An act to provide for the recovery of damages for injuries caused or sustained by reason of defective public highways," etc., does not violate Const. art. 4, § 20, which requires the object of a law to be expressed in its title, by the fact that the title provides for the recovery of damages sustained, while the body of the act makes it the duty of townships, etc., to keep cross-walks, etc., in repair, and empowers them to raise money for that purpose.—FRARY V. TOWNSHIP OF ALLEN, Mich., 52 N. W. Rep. 78.

17. CONTEMPT—Reflections on Judge and Grand Jury.—The publisher of an article reflecting on a grand jury at any time during its session, tending to bring its members into disrepute, and embarrass an investigation as to the commission of a crime, is liable for contempt, even though such investigation had been suspended with no intention at the time to pursue it further.—FISHBACK V. STATE, Ind., 30 N. E. Rep. 1088.

18. CONTRACT—Bohemian Oats.—An answer, in an action on a note for $200, alleging that the only consideration for the note was the delivery of 20 bushels of Bohemian oats, of the value of $5, and a bond providing that the party furnishing the oats would settle for the other, at a future time specified, 40 bushels, at $10 per bushel, and providing also that the contract was not based upon the value of the oats, but was purely speculative, sufficiently shows the illegality of the consideration.—GLASS V. MURPHY, Ind., 30 N. E. Rep. 1097.

19. CONTRACT—Construction.—Where plainiff, as subcontractor, agreed to grade land for a railway company, the work to be done under the supervision of the company's chief engineer, whose classification and measurements of the work performed was to be conclusive on all parties, the contract is valid, and the parties are bound by the estimates, unless they were fraudulently made.—ROSS V. MCARTHUR, Iowa, 52 N. W. Rep. 125.

20. CONTRACT—Subscription.—Where the subscribers appointed a committee, therein named, to make a contract to carry out the purpose of the subscription, and arrange the time and manner of payment, the only limitation being that installments called for should not exceed 15 per cent. per month, payments to begin after work was begun, the committee had authority to agree

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with the company and its contractors that the subscribers should pay installments to the contractors, who, in consideration therefor, should grade the road, and procure right of way and depot grounds.—DARNALL v. LYON, Tex., 19 S. W. Rep. 506.

21. CORPORATIONS—Contracts—Seal.—A corporation, duly organized, may make a valid contract in writing without the use of a seal.—MUSCATINE WATER WORKS CO. v. MUSCATINE LUMBER CO., Iowa, 52 N. W. Rep. 108.

22. CORPORATIONS — Illegal Sale of Stock.—Where a corporation has practically deprived a stockholder of his stock, and the advantages accruing from its ownership, by bidding it in for itself at a sale which it pretends to make under its by-laws, and on account of the failure of the stockholder to meet and pay certain prescribed monthly dues, an action for conversion of the stock, or one in the nature of an action on the case, will lie against the corporation, although such sale was irregular and illegal, having been conducted in total disregard of the requirements of the by-laws authorizing the same.—ALLEN v. AMERICAN BUILDING & LOAN ASS'N, Minn., 52 N. W. Rep. 144.

23. CORPORATIONS—Organization.—Code, § 1061, provides that articles of incorporation must fix the highest amount of indebtedness to which the corporation is to be at any time subject, which must in no case, exeept in that of insurance companies, exceeds two-thirds of the capital stock: Held, where only a portion of the capital was to be paid at the time of signing the articles, which provided that the greatest amount of indebtedness to which the corporation would be subject at any time should not exceed three-fifths of the stock actually subscribed for, that the fact that all the stock was not subscribed was not a failure to comply with such provision.—SWEENY v. TALCOTT, Iowa, 52 N. W. Rep. 106.

24. CORPORATION — Stockholders.—Stockholders in a corporation are not disqualified to vote upon a matter coming before a stockholders' meeting by the fact that they may have a personal interest in the matter, as upon a proposition to ratify a purchase of property from themselves which they as directors had assumed to make.—BJORNGARD v. GOODHUE COUNTY BANK, Minn., 52 N. W. Rep. 48.

25. CORPORATION—Unpaid Stock Subscription.—Where a corporation has made an assignment for the benefit of creditors under the insolvent law, the court in which the insolvency proceedings are pending may make an order requiring payment of unpaid stock subscriptions, the same as the directors might have done before the insolvency proceedings.—MARSON v. DEITHER, Minn., 52 N. W. Rep. 38.

26. COUNTY TREASURER—Burglary of County Funds.—The legislature is not precluded, by article 14, § 3, of the State constitution, ordaining that no school tax shall be appropriated to any other purpose than that for which it was levied, nor by the provisions of the State and federal constitutions prohibiting legislation to divest property rights or impair the obligation of contracts, from passing an act to release a county treasurer from liability for school and county funds taken by burglars, without fault on his part, from a safe furnished him by the county.—PEARSON v. STATE, Ark., 19 S. W. Rep. 499.

27. CRIMINAL EVIDENCE—Confessions.—A confession or criminating admission, made by a person in jail to the sheriff and another, the latter of whom had him arrested and brought him to prison on another charge, and who expected a reward in case of a conviction on the charge now in question, is not admissible in evidence where it was induced by a remark made to the prisoner by such third person, in the presence of the sheriff, in these terms: "Edmund, if you know anything, it may be best for you to tell it:" or, "Edmund, if you know anything, go and tell it, and it may be best for you."—GREEN v. STATE, Ga., 15 S. E. Rep. 10.

28. CRIMINAL LAW—Bribery.—A member of the board of education is an executive officer, and comes within the meaning of Code 1881, §§ 879, 880, which provides a punishment for attempting to bribe an executive officer.—STATE v. WOMACK, Wash., 29 Pac. Rep. 939.

29. CRIMINAL LAW—Burglary.—In a trial under How. St. § 9134, inflicting a penalty on "every person who shall break and enter, in the night-time, any office, shop, store," not adjoining a dwelling house, etc., the question whether the store alleged to have been broken and entered adjoined a dwelling house, or was occupied as such, is a question of fact for the jury.—PEOPLE v. SMITH, Mich., 52 N. W. Rep. 67.

30. CRIMINAL LAW — Presumption of Innocence.—Where the judge in a criminal case charged that it was not for defendant to prove his innocence; that the prosecution must satisfy the jury beyond a reasonable doubt of defendant's guilt; and that defendant must be acquitted unless his guilt was strictly and impartially proven—the jury were sufficiently informed that the presumption of innocence was with defendant until he was proven guilty beyond a reasonable doubt.—PEOPLE v. GRANEY, Mich., 52 N. W. Rep. 66.

31. CRIMINAL PRACTICE — Robbery.—An indictment for robbery, though it follows substantially the words of the statute defining the crime, is insufficient if it fails to allege the ownership of the property taken.—HIGGINS v. STATE, Tex., 19 S. W. Rep. 503.

32. CUSTOM—Insurance Policies.—A local custom that insurance agents, after the termination of their agency, may cancel any of the policies issued through them, is unreasonable, subversive of the principles upon which the rule of law governing the relation of principal and agent are based, and is void.—MERCHANTS' INS. CO. OF NEWARK v. PRINCE, Minn., 52 N. W. Rep. 131.

33. DEATH BY WRONGFUL ACT—Parties.—In an action by a widow to recover damages for the killing of her husband by a mob as all the parties in any way concerned in the tort are liable *in solido*, it is proper to join, as a party defendant with the individuals who participated in the killing, the city in which the act was committed, on the ground of its negligence in not preventing the killing.—COMITEZ v. PARKERSON, U. S. C. C. (La.), 50 Fed. Rep. 170.

34. DEEDS.—Where the owner of several subdivisions of a large track, in which he has an undivided half ownership, sells such subdivisions, and the purchaser pays the purchase money in full, taking receipts therefor, but no conveyance, such purchaser acquires a perfect equity; but if his vendor afterwards sells for value, and conveys by deed to a third person, his original one undivided half of the whole tract, such third person, if unaffected with notice of the outstanding equity in the prior purchaser, will acquire title superior thereto in one undivided half of said subdivisions.—LATHAM v. INMAN, Ga., 15 S. E. Rep. 8.

35. DEED—Construction.—A deed to "S A T and the heirs of S T by S A T, his wife," immediately vested the entire estate equally in S A T and the then living children of said S T and S A T; the word "heirs" referring to the living children of the persons named, rather than to an indefinite line of descendants.—TINDER v. TINDER, Ind., 30 N. E. Rep. 1077.

36. DEED — Delivery.—A father who had executed a deed to his adult children handed it to one of them, telling him to put it in a box used by both father and son for keeping valuable papers, and the son did so. The father retained possession of the land conveyed till his death: Held, that the deed was inoperative for want of delivery.—HAYES v. BOYLAN, Ill., 30 N. E. Rep. 1041.

37. DEEDS — Estate Conveyed.—The language of a deed, based solely on love and affection, was: "I do give and release unto him so much land as will serve for the purpose of cutting a race." The grantor then reserves to herself a third of the mill to be erected by the grantee, after paying a third of its cost, and then binds herself and heirs to warrant and defend her right to the property: Held, that the deed was a conveyance of the land itself, with a reservation of an undivided

one-third and not a covenant to stand seised of the same to the uses and purposes of a copartnership, so long as it should continue.—JORDAN V. NEESE, S. Car., 15 S. E. Rep. 202.

38. DEED—Record—Improvements.—Defendants purchased land from M, and received from him a conveyance with general warranty. M was a mere trespasser, without title of record or otherwise: Held, that defendants, having made no examination of the records, or other investigation which would have disclosed M's want of title, were not entitled to an allowance for improvements placed by them on the land.—ARMSTRONG V. OPPENHEIMER, Tex., 19 S. W. Rep. 520.

39. DEED—Undue Influence.—Where one induces another to become his neighbor, in consideration of the conveyance to him of the land on which to live, it is no ground for setting aside the conveyance that their pleasant relations were subsequently disturbed.—WHITE V. JOHNSON, Wash., 29 Pac. Rep. 934.

40. DEED OF TRUST—Trustee.—Even if a trustee can delegate his power of sale under a deed of trust, one claiming through a sale under the deed of trust, made by another than the trustee, on whom he alleges the trustee had conferred his power, has the burden of proving such delegation.—LITTELL V. JONES, Ark., 19 S. W. Rep. 497.

41. DESCENT AND DISTRIBUTION—Intestate Woman.—A woman having married, borne children, and died intestate, when by law the husband's marital rights could attach upon all the wife's property, real and personal, and when he was her sole heir, her children took no interest in a legacy or devise to which, under deceased father's will, she was already entitled to at the time of her marriage.—SMITH V. WILLIAMS, Ga., 15 S. E. Rep. 130.

42. DOWER—Divestiture.—In Oregon, a conveyance or release by a wife to her husband of her inchoate right of dower is void.—HOUSE V. FOWLE, Oreg., 29 Pac. Rep. 890.

43. EJECTMENT — Pleading.—Where a complaint in ejectment showed plaintiff's title to be based on a deed which was regular in form, and founded on a valuable consideration, it was error to hold the complaint insufficient on demurrer.—EWING V. LUTZ, Ind., 30 N. E. Rep. 1069.

44. EMINENT DOMAIN — Commissioners.—Proceedings in Missouri to condemn property to public use involves the exercise of judicial power.—STATE V. NEVILLE, Mo., 19 S. W. Rep. 491.

45. EMINENT DOMAIN—Damages.—In an action against a railroad company by several persons for the assessment of damages for taking land for a right of way, the fact that a part of plaintiffs have conveyed the land in suit does not bar the action as to those who have not.—SHORTLE V. TERRE HAUTE & I. R. CO., Ind., 30 N. E. Rep. 1084.

46. EMINENT DOMAIN — Extension of Street Across Railroad.—A city has a right to extend streets across a railroad track, even though such extension would subject the railroad company to great inconvenience and hindrance in the operation of its road.—ILLINOIS CENT. R. CO. V. CITY OF CHICAGO, Ill., 30 N. E. Rep. 1044.

47. EMINENT DOMAIN—Jurisdiction of City Court.—Under Rev. St. 1891, ch. 37, § 240, which gives city courts concurrent jurisdiction with circuit courts in all civil cases, city courts have jurisdiction to hear and determine condemnation proceedings.—HERCULES IRON WORKS V. ELGIN, J. & E. Ry. Co., Ill., 30 N. E. Rep. 1050.

48. EQUITY PRACTICE—Substitution of parties.—Where the receiver of an insolvent insurance company files a bill to enforce the alleged liability of certain stockholders, and the supreme court decides that he has no right to file such a bill, since the right to enforce such liability rests with the creditors, it is not an abuse of judicial discretion to refuse to allow the creditors to be substituted as complainants in the suit, even though the receiver consents to such substitution.—FAIRBANKS V. FARWELL, Ill., 30 N. E. Rep. 1056.

49. EVIDENCE — Shop Books.— In an action on a book account there was evidence that some of the goods described therein had been delivered to defendants. The keeper of the books testified to their correctness, as did also one of the firm who furnished the items to the book-keeper. Defendants had made a payment upon the account without questioning it, and afterwards accepted a statement of the account, with the remark that it was "all right," and never made any objection to the correctness thereof between that time and the bringing of the suit, three years later: Held, that a sufficient foundation was laid for the introduction of the books in evidence. — HOUSE V. BEAK, Ill., 30 N. E. Rep. 1065.

50. EXECUTION — State and Federal Courts.— Where two executions issued from the State and federal courts, respectively, it makes no difference that the former first was placed in the hands of the officer, as the latter, under which levy is first made, will hold the property, there being no lien by either judgment.—LEOPOLD V. GODFREY, U. S. C. C. (Ill.), 50 Fed. Rep. 145.

51. FEDERAL COURTS — Appeal— Amount in Controversy.—Where, in an action to recover a debt, defendant pleads usury, and plaintiff's recovery is reduced to that extent, on proceedings in error brought by plaintiff in the Supreme Court of the United States, the amount in controversy between the parties for the purposes of the jurisdiction of that court is the difference between the amount of his actual recovery and the amount which he sought to recover.—NEW ENGLAND MORTGAGE SECURITY CO. V. GAY, U. S. S. C., 12 S. C. Rep. 815.

52. FRAUDULENT CONVEYANCE.—Where a deed of trust secures several creditors, and one or more of the debts secured its fictitious and fraudulent, that fact does not invalidate the deed as to *bona fide* creditors secured by it, not guilty of any fraud.— COHM V. WARD, W. Va., 15 S. E. Rep. 140.

53. FRAUDULENT CONVEYANCE — Possession.— Plaintiff sold his saloon to A, February 12, 1889, taking a note for $120 for a deferred payment, payable May 1, 1889. A acted as proprietor of the saloon with defendant, his brother, as barkeeper, till March 10, 1889, when defendant took charge claiming under a bill of sale from A, who thereafter acted as barkeeper. There was no evidence of any consideration passing between them. Customers had no knowledge of any change of proprietors: Held, that there was no such open and notorious change of possession as was required to support the title of defendant, and that the transaction was fraudulent as to plaintiff. — GOARD V. GUNN, Colo., 29 Pac. Rep. 918.

54. GAMING—Restriction.— The provision of the charter of the city of Minneapolis, giving the city council power to restrain and prohibit all descriptions of gambling and fraudulent devices and practices, held to authorize an ordinance prohibiting the keeping or setting up of any gambling device designed to be used in gambling, and imposing a penalty for its violation.—STATE V. GRIMES, Minn., 52 N. W. Rep. 42.

55. HOMESTEAD — Sale under Execution.— A sale of a debtor's land under execution did not convey as against one claiming under a trust deed made and recorded since the rendition of the judgment and before the sale, so much of his land as constituted his homestead; and that, although he had not claimed it as exempt; and his testimony as to where his homestead lay was conclusive.—DAVIS V. DAY, Ark., 19 S. W. Rep. 502.

56. HUSBAND AND WIFE — Debt of Husband.—A husband being indebted on an open account, his wife wrote the creditor as follows: "You will please find inclosed fifty dollars—all I can raise at present. I hope to be able to give you more very soon. Please give credit, and oblige, B:" Held, that this was insufficient to charge the wife's estate with the payment of the account.—BOHM'S ESTATE V. HOFFER, Colo., 29 Pac. Rep. 905.

57. INJUNCTION—Contempt.—A defendant who manu-

factures and sells a patented article, in violation of an injunction restraining him from doing so, should not be punished therefor as for contempt, where it appears that the complainant was in no way damaged by his acts, since a prosecution for contempt, for the purpose of affording relief between parties, cannot be maintained without proof that the complaining party has been injured by the alleged contempt.—PEOPLE V. DIEDRICK, Ill., 30 N. E. Rep. 1038.

58. INJUNCTION — Remedy at Law.— Where proceedings by a city to open a boulevard across a railway company's tracks are pending on appeal, and the company files a bill to enjoin the city from prosecuting such proceedings, on the ground that irreparable injury will be done to the company, the bill must be dismissed, as the question is a legal one, which will be disposed of in the condemnation proceedings.— DETROIT, G. H. & M. RY. CO. V. CITY OF DETROIT., Mich., 52 N. W. Rep. 52.

59. INSURANCE— Estoppel— Insanity.— A sworn statement by the widow in the proofs of death that her husband committed suicide while insane does not estop her to show that she made the statement on the faith of what others told her, and not from actual knowledge, and that he took poison by mistake.— BACHMEYER V. MUTUAL RESERVE FUND LIFE ASSN., Wis., 52 N. W. Rep. 101.

60. INSURANCE — Policy. — A policy of fire insurance provided that, if the company and the insured could not agree on a loss, the amount thereof should be ascertained by appraisers; that the loss should be paid 60 days after proof of loss; and that it should be optional with the company to take the damaged property at its appraised value, or replace it within a reasonable time, on giving notice within 30 days after the receipt of proof of loss. Fifty seven days after proof of loss had been served on the company it served on the insured notice of a demand for an appraisal, which could not have been made until after the time fixed for payment: Held, that the notice came too late to suspend the insured's right to bring suit.— ZIMERISKI V. OHIO FARMERS' INS. CO., Mich., 52 N. W. Rep. 55.

61. INTERVENTION— Pleading — Amendment.— Where property is under the control of the court in the hands of a receiver, and a creditor of the defendant intervenes by petition *pro inter esse sou*, the petition is amendable at any stage of the proceeding, so as to develop all the material facts out of which the substantial rights of the petitioner as a creditor arose.— BLAIR V. CENTRAL CITY ST. R. CO., Ga., 15 S. E. Rep. 12.

62. INTOXICATING LIQUORS — Civil Damage Suit.—It is proper to instruct the jury to the effect that in estimating plaintiff's damages they may consider not only the earnings of decedent for any given period, but also the probable length of his life till terminated by natural causes.—BETTING V. HOBBETT, Ill., 30 N. E. Rep. 1048.

63. INTOXICATING LIQUORS— Sale to Minor.—A person who sells intoxicating liquor to a minor, though the liquor is intended to be, and is, drunk by a man of full age, violates section 2094, Rev. St. 1881, making it unlawful to sell intoxicating liquor to a minor.—SUMNER V. STATE, Ind., 30 N. E. Rep. 1105.

64. LANDLORD AND TENANT — Denying Landlord's Title. — The estoppel which prevents a tenant from claiming title adversely to his landlord does not depend on the validity of his landlord's title.—GOODE V. GAINS, U. S. S. C., 12 S. C. Rep. 839.

65. LANDLORD AND TENANT—Renewal.—A tenant who, having the right under his lease to hold for another term, notifies the landlord that he does not desire to do so, cannot afterwards bind the landlord by a change of mind especially where the latter has made expenditures in reliance upon the tenant's relinquishing possession.— GRENIER V. COTA, Mich., 52 N. W. Rep. 77.

66. LEASE — Conditions — Waiver. — Where, in an oil lease, there is a clause of forfeiture for non-payment of rental, but the lessor consents that it need not be paid at the times when due, and indulges the lessee, and acquiesces in his failure to pay, there is no forfeiture for nonpayment.— HUKILL V. MYERS, W. Va., 15 S. E. Rep. 151.

67. LIMITATIONS— Application of State Statutes.—Under Rev. St. U. S. § 721, when congress creates a new right of action, without providing any limitation thereto, the State statutes of limitations apply, and are binding upon the United States courts.—COPP V. LOUISVILLE & N. RY. CO. U. S. C. C. (La.), 50 Fed. Rep. 164.

68. LIMITATIONS— Damages to Land.—Taking possession and grading a right of way by a railroad company, so as to make it part of a continuous road-bed nearly a hundred miles in length, was such an appropriation of the land as to give the owner thereof a right of action for damages at that time.—HARSHBARGER V. V. MIDLAND RY. CO., Ind., 30 N. E. Rep. 1083.

69. LIMITATION OF ACTIONS— Absence from State.— Under Rev. St. art. 3216, which provides that the time of a person's absence from the State shall not be taken as a part of the time limited by the statute of limitations, an action commenced June 24, 1889, on an account due plaintiff in April, 1887, where defendant was out of the State from April until October in 1887, was not barred by the two-years' limitation.—WATKINS V. JUNKER, Tex., 19 S. W. Rep. 390.

70. MALICIOUS PROSECUTION — Probable Cause.— The rule that evidence of conversations between the parties to a written contract at the time of its execution cannot be introduced for the purpose of explaining the contract has no application when such evidence is sought to be introduced in an action for malicious prosecution for the purpose of showing a want of probable cause on the part of defendant in causing plaintiff's arrest for obtaining money by false pretenses, made to procure the execution of such contract by defendant. —JESSUP V. WHITEHEAD, Colo., 29 Pac. Rep. 916.

71. MARRIED WOMAN—Material Man's Lien.—A mortgage by a husband and wife on land held by them jointly, to secure the husband's debt, is void.—WILSON V. LOGUE, Ind., 30 N. E. Rep. 1079.

72. MASTER AND SERVANT — Compensation.—Where a corporation has been paying its secretary a certain fixed salary, and also allowing him to receive the dividends on certain stock as additional compensation, a withdrawal by the company of the secretary's right to dividends on said stock does not take away his right to such dividends until he is notified of such withdrawal.—CRANE BROS. MANUF'G. CO. V. ADAMS, Ill., 30 N. E. Rep. 1030.

73. MECHANICS' LIENS — Extinguishment.—The right to a mechanic's lien against a leasehold estate is not lost by the purchase of such estate by the lessor, when the lessor has knowledge of the improvements for which a lien is claimed, and the subsequent filing of the lien claim is within the statutory time. In equity the two estates will be preserved from a merger in order to effectuate the lien against the leasehold.— ELLIS V. PORTER, Utah, 29 Pac. Rep. 879.

74. MORTGAGE—Redemption.—Where, in a suit to redeem land from a trust deed, a decision is rendered authorizing the complainant to redeem on payment of the mortgage debt, with interest, and the cause is remanded to the circuit court, a decree allowing redemption according to the directions of the supreme court is proper.—RYAN V. NEWCOMB, Ill., 30 N. E. Rep. 1040.

75. MORTGAGE FORECLOSURE. — On foreclosure of a mortgage, defendant cannot counter-claim for goods sold or delivered, or for money had and received, under Hill's Code, § 393, providing that in equity the counter-claim must be one in which suit could be brought against plaintiff, or one arising out of the transaction. —SEARS V. MARTIN, Oreg., 29 Pac. Rep. 890.

76. MUNICIPAL CORPORATIONS—Bonds.—A charter provision, requiring all municipal bonds to specify the purpose for which they are issued, is not complied with so as to cut off equitable defenses, as against an inno-

cent holder, by a negotiable bond which merely gives the date of the ordinance authorizing its issuance, without stating the contents or title thereof.—BARNETT V. CITY OF DENISON, U. S. S. C., 12 S. C. Rep. 819.

77. MUNICIPAL CORPORATIONS—Special Assessments.—Where, in a proceeding to assess for street improvements land which is used by a railroad for its right of way, and which has been donated to the railroad for the sole purpose of being so used, it is error to refuse to instruct the jury that the railroad company cannot lawfully apply said land to any other use or purpose than such as is necessary for the operation and maintenance of its railroad.—ILLINOIS CENT. R. CO. V. CITY OF CHICAGO, Ill., 30 N. E. Rep. 1036.

78. MUNICIPAL CORPORATION—Telephone Companies—Poles in Streets.—The grant in a city charter authorizing the council "to license, tax, and regulate" telephone companies "and all their branches of business," carries with it the power to grant such companies the right to erect poles in the streets.—HERSHFIELD V. ROCKY MOUNTAIN BELL TEL. CO., Mont., 29 Pac. Rep. 883.

79. NEGLIGENCE—Fires.—In an action to recover for the loss of lumber destroyed by fire communicated from an adjacent lumber mill, it was error to submit to the jury the question whether defendant was negligent in knowingly employing an engineer and fireman in his mill who were incompetent to perform their duties, because they were addicted to the use of intoxicating liquors, when their intoxication was not shown to have had any bearing upon the origin of the fire or the failure to extinguish it.—MCNALLY V. COLWELL, Mich., 52 N. W. Rep. 70.

80. NEGOTIABLE INSTRUMENT — Note.—In an action against the maker on a note made to two joint payees, it is no defense that the interest of one of the payees was transferred to third parties, where such third parties before suit transferred such interest to the plaintiff the other joint payee.—MCLEOD V. SNYDER, Mo., 19 S. W. Rep. 494.

81. NEGOTIABLE INSTRUMENT — Transfer after Payment.—Defendant, who, as payee of a non-negotiable note, already paid before maturity for valuable consideration, waived protest in writing thereon, and indorsed it over in blank to plaintiff, is liable as an indorser, unless a contrary intention be made to appear.—FIRST NAT. BANK OF SAN DIEGO V. FALKENHAN, Cal., 29 Pac. Rep. 866.

82. NEGOTIABLE INSTRUMENT—Usury as a Defense.—Where the maker of a note after maturity and in consideration of an extension of the time of payment, agrees to pay usurious interest, and the interest thus stipulated is afterwards merged into and forms a part of another note, the defense of usury cannot be made to the former, but only to the latter.—COLLIER V. SOULE, Tex., 19 S. W. Rep. 506

83. OBSTRUCTION OF STREETS.—A railroad company, which has acquired land by condemnation for its uses, had such on ownership therein as to entitle it to damages for the obstruction of a street on which it abuts.—PENNSYLVANIA S. V. R. CO. V. READING PAPER MILLS, Penn., 24 Atl. Rep. 205.

84. OFFICE AND OFFICERS—Misconduct—Drunkenness.—The provisions of Rev. St. arts. 3388, 3393, authorizing removals from office on account of offenses involving "official misconduct," and providing that such misconduct shall include any willful and corrupt failure, refusal, or neglect, do not extend to cases of drunkenness, so as to require actions therefor to be brought under Const. art. 5, § 8, in the district court, but such offenses may be tried in the county court.—CRAIG V. STATE, Tex., 19 S. W. Rep. 504.

85. PARTNERSHIP—Sale of Partner's Interest.—Where one partner sells his interest in the firm, including the firm books and accounts, and receives in part payment therefor the note of the purchaser, the latter cannot afterwards set off an account apparently due the firm from the former, as the presumption is that the account of the retiring member was adjusted in ascertaining the value of his interest.—HOUK V. WALKER, Ind., 30 N. E. Rep. 1080.

86. PAYMENT—Confederate Currency.—Where the personal representatives have accepted payment of purchase-money bonds due the decedent in depreciated Confederate currency, that being the only circulating medium to be had in their neighborhood, and have distributed the proceeds to their heirs, the latter, after accepting the distribution and acquiescing in the transaction for 15 years, are concluded by laches from disputing the validity of the payment of the bonds, in the absence of anything to show that it was not made in good faith.—WASHINGTON V. OPIE, U. S. S. C., 12 S. C. Rep. 822.

87. PLEADING—Amendment of Complaint.—Where the complaint and summons described defendant as the "W. S. Railway Co.," instead of "W. S. Railroad Co.," its proper name, and it was evident which company was meant, the trial court properly ordered the amendment of the papers by striking out "way," where it occurred in defendant's name, and inserting "road," though the W. S. Railway Company still nominally existed.—PARKS V. WEST SIDE RY. CO., Wis., 52 N. W. Rep. 92.

88. PLEDGE — Contract.—A creditor delivered to its debtor an instrument reciting that it held for his benefit certain specifically described choses in action, stocks and bonds, and that "the proceeds arising from the sale of said securities and recovered from said choses in action are to be applied to pay off the debt and interest, and the remainder to be paid to the debtor, subject to the repayment of moneys expended by the creditor in prosecuting the claims or selling the securities:" Held, that the contract did not bind the the creditor to sell the securities without a request from the debtor, nor to prosecute the claims at his own expense, even if he should request it to do so.—CULVER V. WILKINSON, U. S. S. C., 12 S. C. Rep. 832.

89. PRACTICE — Production of Books.—Where a defendant moves for an order for the production of the account books of the plaintiff's firm, for the sole purpose of finding out the amount due plaintiff at a certain date, an order allowing defendant to examine plaintiff's account with the firm, as shown by the books, is all that defendant is entitled to.—RIGDON V. CONLEY, Ill., 30 N. E. Rep. 1060.

90. PRINCIPAL AND AGENT — Usurious Contract.—An agent with authority to buy lands, and intrusted with funds of his principal to pay therefor, without the authority or knowledge of his principal, loaned the money at a usurious rate of interest, and as security for the repayment of the money took from the borrower a deed to the principal of certain land which was in form an absolute conveyance, but in fact executed merely as security: Held, that if the principal elects to accept the deed, and avail himself of the benefits of it, he will hold it as a mortgage merely, and not as an absolute conveyance.—NYE V. SWAN, Minn., 52 N. W. Rep. 39.

91. PUBLIC LANDS.—One who attempts to enter a particular tract of land, then vacant and subject to entry, and with the intention of so doing pays his money or delivers a warrant to the proper government official therefor, acquires an equity therein, though they required a written application, by mistake, misdescribes the land and wholly omits the tract intended; and such equity may be enforced against one who afterwards, with knowledge of the facts, obtains the legal title from the United States for the same land.—HEDRICK V. BEELER, Mo., 19 S. W. Rep. 492.

92. PUBLIC LANDS—Government Surveys.—The United States sold the north half of a government section to plaintiff's predecessors, and set off to the State the south half for schools, by reference to the survey and plat returned by the surveyer general: Held, in an action against the State's grantee, that the location of the dividing line between the north and south half must be determined from such plat and the acts of

congress relating to the survey of the public domain.—GOLTERMANN v. SCHIERMEYER, Mo., 19 S. W. Rep. 485.

93. RAILROAD COMPANIES—Crossing—Negligence.— In an action against a railroad company for negligently killing plaintiff's intestate at a crossing the court erred in charging that, "when a person finds himself on a track where there is an approaching train bearing down upon him, it is for him to determine for himself whether it would be safest to go forward or to go back; and, if he exercises his judgment to the best of his ability, he is not chargeable with negligence if it afterwards turns out that his judgment was wrong."—LIERMAN v. CHICAGO, M. & St. P. RY. CO., Wis., 52 N. W. Rep. 91.

94. RAILROAD COMPANIES — Killing Stock.— In an action against a railroad company for killing a mare and colt, where the evidence shows that there is great danger of collision with animals at the place where the accident occurred, and that the erection of wing fences and cattle-guards would only slightly increase the danger to trainmen, the court cannot say, as a matter of law, that defendant is not required to fence its track.—TOLEDO, ST. L. & K. C. R. CO. v. WOODY, Ind., 30 N. E. Rep. 1099.

95. RAILROAD COMPANIES—Negligence.—A compliance with the statutory duty of stopping and giving a signal before making a crossing of two railroads does not relieve an engineer from the duty of keeping his train under control, when he knows there are no semaphores, flagmen, or gates at such crossing; and an injury received by him in a collision between his engine and an engine on the other road, caused by the negligence of other engineers, does not entitle him to recover damages from such other road. — KELLY v. DULUTH, S. S. & A. RY. CO., Mich., 52 N. W. Rep. 81.

96. RAILROAD COMPANIES — Negligence — License.— Where predestrians use a railroad track as a thoroughfare despite posted notices and other warnings forbidding it, a license for such use is not established.—HYDE v. MO. PAC. RY. CO., Mo., 19 S W. Rep. 483.

97. RAILROAD COMPANIES—Stock-killing—Pleading.—In an action against a railroad company for killing stock, a complaint alleging the maintenance of a fence and cattle-guard at the intersection of the track with a street, and the maintenance of fences on both sides of the track for 400 feet north, so that the stock was permitted to wander on the track at the north end of the inclosure, without being able to escape at the south end, but not containing any averment showing or alleging plaintiff's freedom from negligence, is bad, even on motion for arrest of judgment.— CINCINNATI, W. & M. RY. CO. v. STANLEY, Ind., 30 N. E. Rep. 1103.

98. RAILROAD COMPANY—Venue.—A railroad company is a "private corporation," within Rev. St. art. 1198, subd. 21, which provides that suits against any private corporation may be commenced in any county where the cause of action arose, or in which such corporation has an agency or representative, and that "suits against a railroad corporation may also be brought in any county through or into which its railroad extends;" and a railroad company may be sued in any county in which it has an agent, though the road does not extend into such county. — ST. LOUIS & S. F. RY. CO. v. TRAWEEK, Tex., 19 S. W. Rep. 3[illegible]0.

99. REPLEVIN—Amendment of Statement.—On appeal from a justice of the peace to the circuit court, a statement in replevin may be amended so as to introduce then, for the first time, facts essential to the action.—DOWDY v. WAMBLE, Mo., 19 S. W. Rep. 489.

100. REPLEVIN—Counter-claim. — In an action to recover possession of certain chattles claimed under a mortgage executed to plaintiff by defendant, where the answer demanded judgment for the value or return of certain goods not covered by the mortgage, and alleged to have been wrongfully taken by plaintiff and converted to her use, such claim is a counter-claim, and cannot be considered, under Code, § 3226, providing that in action for the recovery of specific personal property no counter-claim shall be allowed.—CHAPIN v. GARRETSON, Iowa, 52 N. W. Rep. 104.

101. RES ADJUDICATA — Easement in Alley.—Where an alley, over which defendant has granted to plaintiff a right of way, is afterwards obstructed by a permanent building erected by another grantee of defendant, and plaintiff, in a suit against defendant alone, demands damages and the abatement of the building as a nuisance, or a decree granting him a right of way over other land of defendant, a judgment awarding plaintiff damages only is *res judicata* in a subsequent action by plaintiff against defendant's heirs, seeking (1) a decree that he has a right of way in, and access to, another alley, which defendant, after the first suit, allowed him to use; and (2) to restrain the heirs from erecting a building obstructing his access thereto. — HODGE v. SHAW, Iowa, 52 N. W. Rep. 8.

102. SALE — Consignment. — D, having bought a quantity of soap of plaintiff, was induced to take 150 additional cases on consignment, to be accounted for at the rate of $3.25 per case if he succeeded in selling it. D agreed that plaintiff might draw for the soap at 90 days, the draft to be accepted for plaintiff's accommodation, but at maturity should be paid only to the extent of sales by D from the 150 cases. None of the 150 cases was sold by D, and the draft was returned unpaid. The 150 cases were never mingled with D's general stock: Held, that title to the soap remained in plaintiff as against attaching creditors of D.—COLORADO SOAP CO. v. BURNS, Colo., 29 Pac. Rep. 915.

103. SALE OF HORSE—Warranty.— A special warranty upon the sale of a horse may be made to cover blemishes or defects which are open and visible, as well as others, if the intention to do so is clearly manifested. — FITZGERALD v. EVANS, Minn., 52 N. W. Rep. 143.

104. SEDUCTION—Evidence.—In a civil action for damages for seduction, it was proper for plaintiff in his case in chief to prove by his seduced daughter that defendant had admitted the sexual intercourse, and proposed to her to procure an abortion, and also to prove by a doctor that defendant consulted him as to what should be done for a young lady who was in the family way.—BADDER v. KEEFER, Mich., 52 N. W. Rep. 60.

105. SETTLEMENT —Conclusiveness.—Where, in an action for the price of land, defendant introduced receipts showing on their face a full settlement of all dealings between the parties, in the absence of fraud or mistake they were conclusive, and the court should have directed a verdict for defendant, and any errors in the admission of parol evidence to explain them was not prejudicial to plaintiff. — PRATT v. CASTLE, Mich., 52 N. W. Rep. 52.

106. SLANDER—EVIDENCE.—A declaration in an action for slander averred that defendant said of plaintiff in the presence of C and others that plaintiff was a thief, and had stolen broadcloth. C testified that the words were spoken by another woman, in the presence of defendant. There was no evidence that defendant heard the words spoken, except from the inference of her presence within hearing distance, or that she was the instigator of them: Held, that a verdict was properly directed for defendant. — SCHUYLER v. ANDERSON, Mich., 52 N. W. Rep. 64.

107. SPECIFIC PERFORMANCE—Fraud of Agent.—Specific performance of a contract to sell land will not be enforced where defendant's agent, who negotiated the sale to plaintiff, was interested in the purchase, but he kept the fact of his interest from defendant.—GREEN v. KNOCH, Mich., 52 N. W. Rep. 80.

108. SPECIFIC PERFORMANCE—Option to Buy Land.—A contract for the sale of land which provides that in case the purchase money shall not be paid, or other satisfactory arrangement made to complete the bargain, within a certain time, "then all obligations, express or implied under this agreement, shall cease," only gives an option to buy, and cannot be specifically enforced by the vendee, for want of mutuality.—LITZ v. GOOSLING, Ky., 19 S. W. Rep, 527.

109. TAXATION — Lien.—One who purchases property after the assessment of taxes for the year, but before the 1st December, takes the property free from any lien for taxes under the law 1889, § 26, which provides that personal taxes shall be a lien on the personal property of the persons assessed "after the first day of December in each year, and shall take precedence of any sale made after said first day of December"—TOUSEY V. POST, Mich., 52 N. W. Rep. 57.

110. TAX SALE.—Though an insufficient description will defeat the title of a purchaser at a tax sale, his lien for taxes paid will hold if it can be shown what property was intended to be taxed.—TRAVELERS' INS. CO. V. MARTIN, Ind., 30 N. E. Rep. 1071.

111. TAX TITLE—Who may Purchase.—The fact that one, at the time taxes accrued, held the legal title to the land, but which was afterwards set aside because of fraud on the part of his grantors, does not prevent him from afterwards purchasing the tax title, and setting it up against the legal title.—SEYMOUR V. HARRISON, Iowa, 52 N. W. Rep 114.

112. TOWN BONDS—Delivery.—Where a village council, under the statute authorizing the issuance of waterworks bonds, authorizes the president and clerk to sign the bonds, but gives no authority to deliver them, a delivery by the president confers on the holder no right to enforce payment —PORTSMOUTH SAV. BANK V. VILLAGE OF ASHLEY, Mich., 52 N. W. Rep. 74.

113. TRESPASS TO TRY TITLE—Eminent Domain.—In an action of trespass against a railroad company to try title to lands acquired by it under condemnation proceedings, the court erred in admitting evidence a judgment in such proceedings, reciting the fact that notice was given, founded on the report of commissioners stating that they had given such notice to the owners of the land, in the absence of evidence that such notice was executed and returned as required by statute —PARKER V. FT. WORTH & D. C. RY. CO., Tex., 19 S. W. Rep. 518.

114. TRESPASS TO TRY TITLE—Evidence.—In an action by heirs to recover their deceased mother's interest in land, where defendant claimed under a sale on execution against their father, a decree of divorce between the father and mother, obtained in a court of another State, was admissible to show that it was granted prior to contracting the debt for which the execution sale was had.—HENRY V. FORSHEE, Tex., 19 S. W. Rep. 381.

115. TRIAL—Findings—Presumptions.—In an action to recover the balance alleged to be due on a subscription to a corporation, the trial court found that defendant "recognized the validity of the corporation," and "acquiesced" in its expenditures "by paying" the first two calls on his subscription, and then concluded in law that defendant "has waived any defense he might otherwise have had to said subscription by reason of the manner of plaintiff's incorporation:" Held that, the findings not being inconsistent with the legal definition of "waiver," it must be presumed that there was sufficient evidence to justify the conclusion of law. —CALIFORNIA SOUTHERN HOTEL CO. V. CALLENDER, Cal., 29 Pac. Rep. 859.

116. TRUSTS — Powers.—Under a trust deed to hold lands "for the sole and separate use of one C and her children," with the power to sell and dispose of the land at C's request, the trustee, at her request, mortgaged the land. In subsequent proceedings to foreclose, it was adjudged that C's right to incumber the land was limited to the interest of a tenancy in common with her children, and to that extent the mortgage was enforceable: Held, that C thereby extinguished all powers over the remaining lands.—MCNAIR V. CRAIG, S. Car., 15 S. E. Rep. 135.

117. UNITED STATES SUPREME COURT—Jurisdiction.—On *mandamus* to compel a county to issue bonds to a railroad company in payment of a stock subscription, the decision of the State supreme court that, under the State laws and constitution, no subscription has ever been authorized by the requisite numbers of voters, and that even if it were authorized, there was sufficient evidence to warrant the trial court in denying the relief asked, on the ground that the company had never complied with the conditions of the subscription, involves no federal question, and is not reviewable by the United States Supreme Court.—STATE V. HARRIS, U. S. S. C., 12 S. C. Rep. 838.

118. UNITED STATES SUPREME COURT—Jurisdiction.—The United States Supreme Court will not review a decision of a State supreme court rendered upon grounds independent of any federal question, and broad enough in themselves to sustain the judgment.—HALEY V. BREEZE, U, S. S. C. 12 S. C. Rep. 836.

119. UNITED STATES SUPREME COURT—Jurisdiction.—The United States Supreme Court has no general authority to review, on error or appeal, any judgments in criminal cases, whether rendered in the circuit or district courts, or the supreme courts of the territories or the District of Columbia, and an intention to confer such jurisdiction should be expressed in explicit terms. —CROSS V. UNITED STATES, U. S. S. C., 12 S. C. Rep. 842.

120. VENUE—Change—Jurisdiction.—Under Const. art. 6, § 5, requiring all actions for quieting the title to land to be brought in the county in which the land is situated, a court outside of the county has no jurisdiction; and the proper remedy of a defendant, sued in the wrong county, is, not an application for a change of venue, but a motion to dismiss.—FRITTS V. CAMP, Cal., 29 Pac. Rep. 867.

121. VENDOR AND VENDEE—Fraud of Agent.—A plaintiff can recover the difference of value between lots purchased by him and other lots of greater value, which he was led to suppose, by the false representations of defendants' agents, that he was buying, where defendants, who were the vendors, after knowledge of the fraud of the codefendant, their agent, who pointed out the situation of these more valuable lots, representing them to be those which he had purchased, ratified his acts, and retained the proceeds of the sale. —GUNTHER V. ULLRICH, Wis., 52 N. W. Rep. 88.

122. WATERS—Harbors—Powers of Towns.—Const. art. 15, § 1, provides for the appointment of commissioners to establish harbor lines in navigable waters lying in front of "cities," and section 3 provides that "municipal corporations" shall have the right to extend their streets over the intervening tide lands, to and across the area reserved, "as herein provided:" Held, that the word "cities" includes towns.—STIMSON MILL CO. V. BOARD OF HARBOR LINE COMRS., Wash., 29 Pac. Rep. 938.

123. WATERS — Irrigation Companies — Common Carriers.—The liability of an irrigation company for failing to supply a certain volume of water to the holders of water rights, according to contract, cannot be determined on the theory that the company is a common carrier, where the rights in question were acquired from the company after its appropriation of the water in its canal from a public stream.—WYATT V. LARIMER & WELD IRRIGATION CO., Colo., 29 Pac. Rep. 906.

124. WILLS — Construction —The will of L contained the following clause: "I give and bequeath to my wife, M L, all my estate, both real and personal, of every kind and description, for the purpose of raising her children, to have and to hold to her and her heirs forever." Said clause conferred upon the wife an absolute estate in the property mentioned, and created no trust in favor of the children.—SEAMONDS V. HODGE, W. Va., 15 S. E. Rep. 156.

125. WITNESS — Proof of Handwriting.—To render a witness competent to testify as to the genuineness of the signature of another, as one having personal acquaintance with his handwriting, it is not necessary that he should have seen the party write. Such personal acquaintance may be acquired by having seen papers, purporting to be the handwriting of the party, and which he has acknowledged or acquiesced in as being genuine.—BERG V. PETERSON, Minn., 52 N. W. Rep. 37.

XUM

ABSTRACT OF DECISIONS OF MISSOURI COURTS OF APPEAL.

ST. LOUIS COURT OF APPEALS.

ACCORD AND SATISFACTION — When takes Place.—If there is a controversy between a creditor and his debtor as to the amount which is due, and if the debtor tenders the amount which he claims to be due, but on condition that the creditor accepted in discharge of his whole demand, and the creditor does accept it, that will be an accord and satisfaction as a conclusion of law. Affirmed.—PERKINS v. HEADLEY BROS.

ALIMONY PENDENTE LITE—When Refused.—It is necessary in order to obtain a decree for alimony *pendente lite*, or suit money, that the husband and wife be living separately, and such alimony should not be awarded after a hearing on the merits when it appears that a wife petitioner had no reasonable ground for bringing suit. Affirmed.—ADAMS v. ADAMS.

CITIES—Ordinance — Resolution.—Section 1495, R. S. empowering cities of the third class by ordinance only to provide for street improvements, is duly complied with by a special resolution of the council and mayor with all the formalities of an ordinance. Affirmed.—CITY OF SPRINGFIELD v. KNOTT.

CORPORATIONS—Agency—Proof of.—Where there is a corporate usage by the president of a corporation exercising certain powers and his conduct is known by his co-directors, it is a question for the jury under appropriate instructions, whether he was held out as an agent of the corporation vested with such powers. Reversed.—STATE v. HICKART.

CRIMINAL LAW—Gross Lewdness.—A conviction for open gross lewdness under sec. 3798 R. S. cannot be had when the defendants are guilty simply of adultery in a a closed up house in the day-time. Reversed.—STATE v. PHILLIPS.

CRIMINAL LAW—Information.—When the margin of an information reads "State of Missouri, County of Butler v. J. M." the objection that the information does not run in the name of the State is not good, the words "County of Butler" being mere surplusage, which sec. 4115, R. S. provides shall not invalidate an information. Reversed.—STATE v. MURPHY.

ESTOPPEL IN PAIS—Requisites.—Two of the requisite elements of estoppel *in pais* are that the act by which the party is sought to be estopped must have been done with the intention that the other party should act upon it, and the other party must have been induced thereby to act to his prejudice. Reversed.—BAKER v. MCINTURFF.

JUDGMENT—Reversal.—A judgment for plaintiff on a plea in abatement to an attachment may be reversed and remanded, and the judgment on the merits in the same cause be allowed to stand unreversed to await the trial anew of the plea in abatement. Reversed.—PADDOCK-HAWLEY IRON CO. v. GRAHAM.

JURIES—Secret Instruction of.—The calling back of the jury and giving of an instruction by the court, in the absence of the parties and their counsel, is error in itself under the statutes and decisions of this State, though the instruction contained no error, since the counsel is barred the privilege of exception and of argument of the instruction in connection with the evidence. Reversed.—STATE v. MEAGHER.

JUSTICE'S COURTS—Suit for Possession of Land—Rent. A purchaser can only recover possession from the lessee of his vendor in a justice's court when he has a deed regularly acknowledged. When he brings an action under section 6397, R. S. he cannot recover rent although the tenant has attorned to him. An action under this section can be only for possession. Reversed.—DUKE v. COMPTON.

NOTES—Failure of Consideration.—Where defendant gave a note in payment for a house and lot and payee in the note agreed to make a deed to the property, it is a good defense to the note, nothing be shown in regard to the possession of the property, that the plaintiff has not made the deed. Affirmed.—WHITLOCK v. APPLEBY.

PRACTICE—New Trial.—It is error in the trial court to refuse a new trial when the preponderance of evidence against the verdict is so strong as to raise a presumption of prejudice, corruption or gross ignorance on the part of the jury. Reversed.—WALTON v. K. C FT. S. & M. RY.

STATUTE OF LIMITATIONS—Attorney and Client.—Limitation begins to run in favor of an attorney on a claim for money collected for his client from the time of the latter's knowledge of the collection, but the evidence should be clear and uncontroverted that the client had such knowledge to make the statute run. Affirmed.—DONAHUE v. BRAGG.

SURETYSHIP—Negligence of Creditor.—A creditor, who in any manner acquires a valid lien on the property of his principal debtor and afterwards voluntarily releases such lien, exonerates sureties to the extent of the value of such property, but this is not the case where the lien is lost simply by neglect on the part of the creditor to proceed to enforce it, coupled with the wrongful act of the principal. Reversed.—ENGLISH v. SEIBERT.

TAXATION—By Cities.—Section 8193 of the statutes of 1889 lays a qualification on the powers granted in section 1589 to the mayor and aldermen of cities of the fourth class to tax theatrical and other amusements, prohibiting such tax in cities of less than 5,000 inhabitants, when the performance is held in an opera house. Affirmed.—NEGROTTO v. CITY OF MONET.

KANSAS CITY COURT OF APPEALS.

CONDEMNATION—Exceptions—Costs.—On a motion to retax costs in a condemnation proceeding by a railroad against a number of resident owners, held, the proceeding begun under sec. 2737, R.S., was but one case, a trunk case, upon which as many branches grew as there were separate exceptions, and the transcript the clerk is required to make on a change of venue, consists of the petition, summons, and return thereon as to each exceptor, the order of court fixing the time and place for appointing commissioners, the order appointing commissioners, report of commissioners, written exceptions filed by each of the parties, orders of court in respect thereto, and order for change of venue, and not a full copy of such record in the case of each exceptor.—K. C. N. & FT. SMITH R. R CO. v. ERVIN.

DAMAGES—Railroad—Killing Stock.—In an action for killing stock, held, where animals get on railroad track at a place away from a public or private crossing, they are mere trespassers, defendant's servants are not required to anticipate the presence of stock away from such places, and are only bound to use ordinary care to protect such animals after discovering their danger.—JEWELL v. K. C. C. RY. CO.

DEFENSES—Negligence.—It is no defense to an action for damages that plaintiff was violating the law in a given particular at the time of the injury complained of, unless such violation of law was the proximate and efficient cause of the injury. When grain or hay is stacked within the limits prohibited by sec. 2614, R. S., of a railroad right of way, and destroyed by fire resulting from negligence of the road, it cannot be allowed in an action grounded on negligence to plead such unlawful act as a defense.—REED v. MO. PAC. RY. CO.

EVIDENCE—Pleading.—In an action for wrongful conversion of a stock of goods: Held, where a cause of action which once existed has been subsequently determined, such new matter must be specially pleaded. Where the cause of action never existed the appropriate defense is a denial of the material allegations of the petition. Under a general denial the defendant may adduce evidence showing that mortgage was fraudulent and void as to creditors, for such evidence tends to prove that the mortgagee's cause of action never existed.—HARDWICK v. COX.

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